VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	
v.	CRIMINAL NO: 102888
	Hon. Jane Marum Roush
LEE BOYD MALVO,	
Defendant	

DEFENDANT LEE MALVO'S MOTION TO PRECLUDE THE COMMONWEALTH FROM SEEKING A SENTENCE OF DEATH BASED UPON THE "VILENESS" AGGRAVATOR AND INCORPORATED MEMORANDUM

COMES NOW, the Defendant, Lee Boyd Malvo, by and through counsel, and hereby moves this Court, pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, and Article One, Sections Nine and Eleven of the Virginia Constitution, as well as Virginia Code § 19.2-264.2, to preclude the Commonwealth from seeking a death sentence based on the "vileness" factor, as the factor is too vaguely defined to be properly applied, and is nonetheless inapplicable to this case. In support of his Motion, Defendant hereby states as follows:

Factual Background

Defendant Lee Boyd Malvo has been indicted on three counts including two counts of capital murder pursuant to Virginia Code §§ 18.2-31(8) and (13). Count II, specifically, under subsection 8 of the capital murder statute, charges that Lee Malvo "did willfully, deliberately and with premeditation kill and murder Linda Franklin, said killing being the killing of more

than one person within a three-year period." The evidence shows that Mrs. Linda Franklin died instantly as the result of a single gunshot wound.[1]

Discussion

I. The "Vileness" Aggravator Suffers Incurable Constitutional Defects

Under existing Virginia statutory law, in order for a jury to impose a sentence of death, they must first find, beyond a reasonable doubt, that the Defendant would be a future danger *or* that his conduct was so vile that a death sentence is appropriate. Va. Code Ann. §§ 19.2-264.2 and 19.2-264.4(C) (Michie 1950), as amended. Death is warranted, according to the statue, where the defendant's conduct was so "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim". Id. In an apparent effort to reduce the glaring subjectivity of the statutory language, the Virginia Supreme Court has gone further to define "depravity of mind" "to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E. 2d 135, 149 (1978).

The Commonwealth's evidence in this case will not support a finding that any of the three components of vileness are applicable in this matter. However, as the Commonwealth has suggested that it will seek to prove only the "depravity of mind" component at trial, the Defendant must address the impossibility of rational or just application of what remains a vague and basically undefined element.

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[1] It is assumed, for purposes of this Memorandum only, that the Commonwealth's evidence will prove that Mr. Malvo is the "triggerman" in the shooting of Mrs. Linda Franklin, as otherwise the issue of the death penalty as to Count II is moot. This assumption should not be interpreted as a waiver or concession as to any issue in dispute, and Mr. Malvo would reiterate his plea of "not guilty" on all counts.

(i) **Federal Law**

The Supreme Court of the United States has

> reiterated the general principle that aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not. See Spaziano v. Florida, 468 U.S. 447, 460 (1984) ("If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"); Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

Lewis v. Jeffers, 497 U.S. 764, 776 (1990). The Court has posited, therefore, that constitutional construction *must* be given to aggravating factors, to properly "channel the sentencer's discretion" by "clear and objective standards" which provide "specific and detailed guidance". Godfrey v. Georgia, 446 U.S. 420, 428 (1980), citing Gregg v. Georgia, 428 U.S. 153, 198 (1976); Proffitt v. Florida, 428 U.S. 242, 253 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

The Court dealt with the very terms at issue here in both *Gregg* and *Godfrey*, as the Georgia statute before the bench in both cases was (and assumedly is still) worded quite similarly to Virginia's 19.2-264.4(C), including: "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim". Ga.Code Ann. § 27-2534.1(b)(7) (Supp. 1975). The Court upheld a death sentence in *Gregg* and overturned a death sentence in *Godfrey* based on the same foundation – that the proper application of the statute required the use of narrowing construction. The Court concluded, quite reasonably, that *any* murder might be considered depraved, inhumane, horrible, etc., and

therefore such labels do not distinguish capital cases from non-capital cases. See Zant v. Stephens, 462 U.S. 862, 877 (1983). *Only* through limiting jury instructions, judicial constructions or both, can the crucial distinction be made and a Defendant's Eight Amendment protection preserved. Circuit Courts have followed suit. See, e.g., Battle v. Delo, F.3d 1547, 1562 (8th Cir. 1994); Deutscher v. Whitley, 946 F.2d 1443, 1446-47 (9th Cir. 1991).

(ii) Virginia Law

Virginia ostensibly agrees with the federal courts that the statute, standing alone, offers too little guidance. In Smith, supra, the Court therefore attempted to define the term "depravity of mind." Unfortunately, where the term "depravity of mind" itself begs subjective interpretation, the *definition* provided by Smith *demands* it: depravity of mind is "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Smith, 219 Va. at 478, 248 S.E. 2d at 149.

There is a superficial attempt to relate the illusory concepts of "degree of moral turpitude" and "psychical debasement" to more familiar legal concepts of "malice" and "premeditation", but one cannot make a comparison of two concepts without a proper definition for both. Thus, the definition of "depravity of mind" as a whole offers no clarification whatsoever and simply opens the door even wider to jurors' subjective interpretation of what is "moral turpitude", what is "inherent" in malice and premeditation, as well as to what degree one must falter to surpass that undefined threshold. The ultimate decision then, between life and death, is based upon no legal principle whatsoever. The Court must recognize that simply providing a definition does not cure the constitutional defect if the definition is unworkable. The jury *must* be able to apply the definition to prevent arbitrary and capricious imposition of the death penalty. To date Virginia's death penalty statute neither includes, nor has been

supplemented by, effective guiding definitions or principles. For that reason, the Commonwealth should be precluded from seeking the death penalty in this matter.

II. None of the three Sub-elements of "Vileness" are Applicable in this Case

"Vileness" is indicated by "torture", "aggravated battery" or "depravity of mind." See Va. Code Ann. § 19.2-264.2. Proof of *any* of the three, beyond a reasonable doubt, qualifies the offense as "vile" -- and the defendant eligible for death. See Tuggle v. Commonwealth, 230 Va. 99, 108, 334 S.E.2d 838, 844 (1985), *vacated on other grounds*, Tuggle v. Netherland, 516 U.S. 10 (1995) (per curiam). The evidence in this matter will not support a finding that any of the three components of vileness are applicable. The Commonwealth has conceded as much as with regard to torture and aggravated battery, and discussion of "depravity of mind" follows.

(i) The Depravity of Mind Sub-element is Inapplicable to the Instant Case

The third sub-element of the vileness aggravator--depravity of mind—does not apply to Defendant's case. As stated earlier, the Supreme Court of Virginia has defined depravity of mind as "a 'degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.'" Walker, 258 Va. at 72, 515 S.E.2d at 575-76 (quoting Smith, 219 Va. at 478, 248 S.E.2d at 149). Even when the evidence is viewed in the light most favorable to the Commonwealth, the Defendant's alleged conduct in committing this offense does not establish the "degree of moral turpitude and psychical debasement" required to support a finding of the depravity of mind sub-element. Id. at 72, 515 S.E.2d at 575-76.

For example, in Correll v. Commonwealth, 232 Va. 454, 352 S.E.2d 352 (1987), the defendant used his victim's unconscious body as a target for knife-throwing. Correll, 232 Va. at 468, 352 S.E.2d at 360. The Supreme Court of Virginia upheld the trial court's finding of

depravity of mind, noting: "Only an evil, distorted imagination could have conceived the villainous plan to kill [the victim] by using his prostrate body as a target for knife-throwing." Id. at 468, 352 S.E.2d at 360. In Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595 (1989), *cert. denied*, 491 U.S. 910 (1989), defendant raped and sodomized his victim after he bound her wrists and ankles. Defendant stabbed his victim in the back and covered her mouth with a pillow to muffle her screams. He then stabbed her in the stomach to a depth of 6.5 inches while holding the pillow over her face. Hoke, 237 Va. at 306-09, 377 S.E.2d at 597-99. The Supreme Court of Virginia held that these facts supported a finding of the depravity of mind component. Id. at 316, 377 S.E.2d at 603.

No mischief similar to the Correll or Hoke facts is alleged to have occurred in the instant case; there is no evidence to support a finding that Lee Malvo acted with a "degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Smith, 219 Va. at 478, 248 S.E.2d at 149. This Court, therefore, should preclude the Commonwealth from seeking to prove vileness based on the depravity of mind component.

WHEREFORE, as the "vileness" factor suffers incurable constitutional defects, and is, as defined, inapplicable to this case in any regard, the Defendant respectfully prays that the Court preclude the Commonwealth from seeking the death penalty based upon the "vileness" factor.

Respectfully submitted,
LEE BOYD MALVO

By: _____
Co-Counsel
and

By: _____
Co-Counsel

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CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was hand-delivered to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road
Room 123
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
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Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 14th day of March, 2003.

Co-Counsel

and

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO: 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

MOTION REQUESTING THAT THE COURT ORDER THE CLERK TO PRODUCE A LIST OF PERSONS SELECTED FOR THE JURY PANEL AND A COPY OF THEIR INFORMATION QUESTIONAIRE TO COUNSEL FOR THE DEFENDANT

The defendant, Lee Boyd Malvo, by and through his co-counsel, requests that this Court order the Clerk of the Court to produce and deliver to the defendant's counsel both a list of all persons selected as a potential member of the venire for this jury panel and a copy of each juror's information questionnaire as soon as possible, but in any event no later than August 1, 2003. See Va. Code Ann. § 8.01-353 (Michie 2002). The defendant states the following in support thereof:

(1) Such information will enable the defense to select a fair and impartial jury by aiding the defense in determining whether any persons selected for the jury panel have a possible prejudice or bias;

(2) Such information will further help the defense in initially determining the attitudes, held by each prospective juror, in regard to the death penalty. Such an initial determination is important as those attitudes may prevent, or substantially impair, a prospective juror's ability to perform his or her legal obligations.

For the foregoing reasons the Defendant respectfully requests that this Court grant the Defendant''s motion, and enter an order in accordance with this motion.

Respectfully submitted,

LEE BOYD MALVO

By _____
Co-Counsel

and

By _____
Co-Counsel

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this 14th day of March, 2003.

Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

MOTION FOR ADMISSION OF PRISON LIFE EVIDENCE AS REBUTTAL TO COMMONWEALTH'S EVIDENCE OF FUTURE DANGEROUSNESS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW the Defendant, Lee Boyd Malvo, by and through his co-counsels, pursuant to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 11 of the Constitution of Virginia and respectfully moves this Court to admit evidence of prison life in order to rebut the Commonwealth's case for death. In support of this motion, Defendant Malvo states as follows:

1. Defendant has a Due Process right not to be sentenced to death on the basis of information which he has had no opportunity to deny or explain. Gardner v. Florida, 430 U.S. 349, 362 (1977); see also Skipper v. South Carolina, 476 U.S. 1, 5 (1986).

2. Defendant must be permitted to introduce rebuttal evidence which denies or explains any information upon which the prosecution relies in seeking the death penalty. See Gardner v. Florida, 430 U.S. 349 (1977); Skipper v. South Carolina, 476 U.S. 1 (1986); Simmons v. South Carolina, 512 U.S. 154 (1994). When the Commonwealth seeks to establish evidence of "future dangerousness," the defendant must be permitted to introduce rebuttal evidence which denies that he poses a continuing serious threat to society.

3. The only two possible sentences for a defendant convicted of capital murder are death and life imprisonment. See Va. Code Ann. §19.2-264.4. A defendant convicted of capital murder in Virginia will never be eligible for parole. See Va. Code Ann. §53.1-165.1; see also Va. Code Ann. §53.1-40.01. The only society he will ever be a part of is the prison society.

4. Evidence regarding the security of prison life and the structure of prison life must be permitted whenever the Commonwealth intends to prove "future dangerousness" as an aggravating factor, as set out in Va. Code Ann. §19.2-264.4(C). Introduction of this evidence should be allowed to rebut the Commonwealth's assertion that the defendant will probably commit criminal acts of violence in the future. This evidence will demonstrate defendant's curtailed opportunities to commit criminal acts while incarcerated.

5. In the case at bar the Commonwealth has already noted its intent to comment upon an alleged "attempted escape." [See Commonwealth's Response to Motion 9 - Motion to Limit Excessive Numbers of Law Enforcement Officers in the Courtroom.]

6. Filed herewith as Defendant Malvo's proffered Exhibit A is the transcript of testimony of Stanley K. Young, Warden of Wallens Ridge State Prison (one of the "supermax" prisons operated by the Virginia Department of Corrections) as was offered in the matter of Commonwealth v. Sterling K. Fisher, when heard in Fairfax Circuit Court on March 15, 2001. In the testimony he outlines the conditions of confinement, the methods and success of restricted movement, strict supervision, use of Tasers and non-lethal weapons to control inmate behavior and movement to prevent any misconduct or acts of violence by those confined.

7. Virginia Code Section 19.2-264.2 states in pertinent part,

> "a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society...." [Emphasis added]

8. Virginia Code Section 19.2-264.4(C) expands the basis of a potential death penalty from merely "past criminal record" and includes this phrasing:

> "The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society." [Emphasis added.]

9. The Virginia Supreme Court in Burns v. Commonwealth, 261 Va. 307, 339, 541 S.E.2d 872 (2001) commented that the relevant inquiry was not whether an accused "could" commit criminal acts of violence in the future but whether he "would". Such a distinction ignores the obvious conclusion that has to be draw from the proffered testimony as to how inmates in Virginia "supermax" prisons are held and handled. Clearly one "would not" commit future criminal acts of violence where one's conditions of detention, movement, interaction with others, etc. is so stringently restricted as to make it so one "could not" commit such acts.

10. Where the jury is only required to find a "probability" that the accused would commit future criminal acts of violence, it certainly is relevant to produce to that jury evidence that conditions of incarceration would be such that the inmate "could not" do so. There is, at a minimum, far less probability that the accused "would" commit such acts when conditions of confinement virtually preclude him from having the ability to do so.

11. Under the language of Section 19.2-264.4(C), for a jury to be able to consider the penalty of death it must find there is a probability of a continuing threat to society. The alternative to the death penalty is imprisonment for life without the possibility for parole. The only potential of being a "continuing threat" therefore is in the context of confinement. It

certainly then is probative and worthy of the jury's consideration to see the degree of limitation placed upon such an inmate to prevent any such "continuation".

12. Exclusion of evidence regarding prison life and prison structure undermines the reliability of the appropriateness of the death sentence and thus constitutes cruel and unusual punishment in violation of defendant's Eighth and Fourteenth Amendment rights under the United States Constitution. See Gardner v. Florida, 430 U.S. 349, 364 (1977) (White, J., concurring); Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring).

WHEREFORE, based on the foregoing and on the evidence to be adduced at a hearing on this motion, the defendant respectfully requests that "prison life" evidence be admitted in order to rebut the Commonwealth's case for death.

Respectfully submitted,

LEE BOYD MALVO

By___
Co-Counsel

and

By_____
Co-Counsel

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Judge
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this 14th day of March, 2003.

~~Co~~-Counsel

Co-Counsel

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FAIRFAX, VA

DEFENDANT'S
EXHIBIT
A

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - x

COMMONWEALTH OF VIRGINIA,

-vs-

STERLING W. FISHER,

Defendant.

- - - - - - - - - - x

CRIMINAL NO. 97264

Fairfax, Virginia

Thursday, March 15, 2001

The above-entitled matter came on to be heard before the HONORABLE ROBERT W. WOOLDRIDGE, JR., Judge, in and for the Circuit Court of Fairfax County, in the Courthouse, Fairfax, Virginia, beginning at 10:04 o'clock a.m.

APPEARANCES:

On Behalf of the Commonwealth:

RAYMOND F. MORROGH, ESQUIRE
Deputy Commonwealth's Attorney

On Behalf of the Defendant:

MARK J. PETROVICH, ESQUIRE

Also Present:

MICHAEL ARIF, ESQUIRE

* * * * *

C O N T E N T S

PROCEEDINGS

(The Court Reporter was sworn by the Clerk of the Court.)

MR. PETROVICH: Good morning, Your Honor. Mark Petrovich for Mr. Fisher.

THE COURT: Yes, sir. We start at 10:00 o'clock.

Commonwealth versus Sterling Fisher. Let's bring Mr. Fisher in, please.

(The Defendant entered the courtroom.)

THE COURT: This is the matter of the Commonwealth of Virginia versus Sterling W. Fisher, Criminal Case Number 97264. Mr. Fisher is present in the courtroom along with his counsel, Mr. Petrovich, the Commonwealth represented by Mr. Morrogh.

The matter comes before me this morning for an evidentiary hearing in relation to the Defendant's motion to present certain evidence at a sentencing phase, in the event a sentencing phase arises in this trial, certain evidence relating to conditions of prison life.

The matter was before me by motion, perhaps a month ago, and I indicated at that time I would take the matter under advisement, and I had since advised counsel

that I would want to hear -- rather than a proffer, I would want to hear from the witness the evidence, the sort of evidence that counsel would propose to submit at a sentencing phase on this issue so I can make a determination as to whether or not it should be allowed or not.

I believe the witness is going to be appearing by phone.

Mr. Petrovich, what is his or her name?

MR. PETROVICH: That's correct sir. It's Mr. Stan Young. He's the Warden at Wallens Ridge Correctional Facility.

THE COURT: Do you have a telephone number?

MR. PETROVICH: Yes, Your Honor. It's 540-523-3310, extension 2000. The first point of contact will be his assistant whose name is Lynn. They are both aware that we'll be calling, and they are aware of what's going on.

THE COURT: All right. Any matters counsel want to take up or address before I make the call?

MR. PETROVICH: No, Your Honor.

THE COURT: And you're ready to simply call him when we get him on the phone and call him as a

witness?

MR. PETROVICH: Yes, Your Honor.

THE COURT: All right.

(Whereupon, a telephone call was placed to Warden Stanley K. Young by the Court.)

SECRETARY: Warden's office, Lynn Hall.

THE COURT: Good morning, this is Judge Wooldridge in the Fairfax County Circuit Court. How are you this morning?

SECRETARY: I'm fine.

THE COURT: Is Mr. Young in, please?

SECRETARY: Hold on, please.

THE COURT: Thank you.

(Pause.)

WARDEN YOUNG: This is Warden Young, can I help you?

THE COURT: Mr. Young, it's Judge Wooldridge in the Fairfax County Circuit Court. How are you this morning?

WARDEN YOUNG: Good morning, sir. How are you?

THE COURT: Fine, thank you. I'm sitting in the courtroom. We have you on a speaker phone. With me

are Mr. Sterling Fisher who is the Defendant in this case, Mr. Mark Petrovich, who is Mr. Fisher's attorney, and Mr. Raymond Morrogh, who is the Deputy Commonwealth's Attorney, along with my clerk and my law clerk.

It's my understanding that Mr. Petrovich may have spoken to you prior to today, both to arrange this call in terms of the time, and to give you some sense of what it is that he has indicated to me he would like to offer in the way of evidence at any sentencing phase in this trial and I'm -- are you prepared to testify today in that respect?

WARDEN YOUNG: Yes, I am.

THE COURT: All right. What I would like for you to do is -- I know we're on a speaker phone, but I'll simply ask that you raise your right hand and I'll swear you in as a witness.

WARDEN YOUNG: Okay.

(The witness was sworn by the Court.)

THE COURT: All right. I'm going to let Mr. Petrovich begin by asking you questions and then I'll let Mr. Morrogh ask any questions that he wishes.

Mr. Petrovich, you can try speaking from there.

Mr. Young, if you have any difficulty hearing Mr. Petrovich, please don't hesitate to tell me and I'll have him come up closer to this phone.

WARDEN YOUNG: All right.

Whereupon

STANLEY K. YOUNG

a witness, was called for examination by counsel on behalf of the Defendant, and, after having been previously duly sworn by the Clerk of the Court, was examined and testified, as follows:

DIRECT EXAMINATION

BY MR. PETROVICH:

Q Mr. Young, can you hear me?

A Yes, I can.

Q All right. Good morning, sir.

A Good morning.

Q I'm going to start by asking you some questions. You and I discussed this previously -- what this proceeding is about; is that correct?

A Yes.

Q Sir, where are you employed?

A I'm employed with the Virginia Department of Corrections at Wallens Ridge State Prison.

Q Who's your employer?

A Virginia Department of Corrections.

Q How long have you been employed in that capacity?

A I've been with the department for twenty years. I've been the Warden at Wallens Ridge since it opened in April of '97. I mean April of '99. It was constructed in '97.

Q What other positions have you held with regard to the Virginia Department of Corrections?

A My career has extended from a correctional officer, a counselor, assistant superintendent at an maximum security juvenile facility, assistant superintendent at a adult facility, superintendent at an adult facility, warden at Bland Correctional Center, and warden at Wallens Ridge State Prison.

Q With regard to your current position, do you oversee Wallens Ridge and Red Onion or is it just limited to Wallens Ridge?

A Just to Wallens Ridge.

Q Do you also teach with regard to corrections subject matters?

A Yes. I teach at the Mountain Empire Community

College.

Q What do you teach there, sir?

A Adult corrections.

Q What level -- is this at a college level course?

A Yes.

Q Mr. Young, I'd like to direct your attention to a subject matter that we've discussed in the past.

Can you describe for the Court what the level system is?

A The level system is a system that was implemented -- with the appointment of Ron Angelone as our director which basically classifies the inmates based on their behavior, their current offense, and the need for a rehab program. Level one being the less secure, the work centers, the field unit types, all the way up to a level six, which there are only two level six which is Red Onion and ourselves.

Q When was the level system implemented?

A The level system was implemented with the construction of the two level sixes, it got into full swing which Red Onion opened in August of '98 and we opened in April of '99.

Q Why was the level system implemented in Virginia?

A The level system overall provides a better classification system. It provides a tool for the department to maintain greater control in the prison system.

It's like -- when I speak, I give the example of the school system. If a school teacher could take all the disruptive children out of the class and separate them and just teach the ones that wanted to be there and wanted to learn, how much more progress they would make.

So, basically we did the same thing with the level system. We took the inmates who were disruptive, long -- very long sentences, and we separated those to where it enhanced our rehab efforts in our lower levels.

Q Describe the success of the level system so far.

A The success has been -- I mean, it's done very well. We've taken the problem inmates and the long term inmates and separated those into the 5's and the 6's which reduce the level of serious incidents in the lower level prison such as the 2's and the 3's which enhance their rehab efforts.

You had the inmates who wanted to go to these programs there and not the ones who were just there to say they were there to get the credit on their treatment plan. So, it has reduced the overall level of incidents within the department by removing the problem inmates and also having a place, you know, if you want to -- "If you want to act out, then we have a place to send you," and the level 6's have also become a deterrent in that way.

Q What has been the effect on the number of serious incidents that get reported to the facilities?

A As the -- the lower level facilities in one -- well, two in particular, is Keen Mountain Correctional Center and Nottoway Correctional Center. Their serious incident reports have dropped probably by 80 percent.

Q How about the effect on the higher level institutions?

A Well, obviously, we're going to have -- the higher levels have more serious incident reports due to the nature of the inmates that we have, but our restrictive movement and our less than lethal weapons that we have on the inside, and some of the movement procedures that we have keep those incidents to a minimum.

Q Can you describe for His Honor what a serious

incident -- an example of some serious incidents when you say that?

A A serious incident can range from anything to an inmate banging his head into the door to assaulting an officer. Anything which causes my staff to directly deal with the inmate to come into a hands-on situation, we consider it a serious incident.

Q Serious incidents also include behavior that doesn't involve contact with other individuals?

A Yes.

Q What is the anticipated duration of this level system with regard to the Virginia Department of Corrections?

A As it is written, if an inmate comes here to a level six --

Q I'm sorry, Mr. Young, let me interrupt you and let me redirect because I'm going to get to that later.

My question pertained to -- let me rephrase that.

How long do you anticipate that the level system will be in place?

A The level system is relatively new in the corrections field. We're pretty much on the cutting edge.

It's not an old concept that we've just now latched onto. It's relatively new and I see that -- I see the level system being in place for many years to come.

Q With regard to the level system, where would a convicted capital murderer "lifer" -- in quotes I say that -- fit into the level system.

A Initially, he would probably be a six, maybe a 5. I doubt it. But in the level system, he would probably start out as a six. If he behaved himself here, then he could be reduced in the level, but the lowest that he could go would be a level four.

Q With regard to security measures in the level system, and I direct your attention to the facility for which you are the Warden, Wallens Ridge, I want to talk to you about what measures are taken quote "inside the wall."

Are there towers inside the wall?

A Yes. The institution can house 1,200 inmates. It's divided really -- it's dividing in half to where actually inmates on one side never see the inmates on the other side, and the inmates in one building never see inmates from the other building.

The reason we do that, we keep our inmates in groups never larger than 85. Everything's controlled

movement. When they walk across the yard, the general population inmates walk across the yard to go to the dining hall, everything's done in single file. If they go to the gym, they walk in single file.

There are red zones where inmates are not allowed to go. They're given a verbal warning and they are dealt with accordingly. Anything that an inmate does to disrupt an orderly operation of the institution is met with immediate fire power or any force that we could use to bring him back into compliance.

Q Well, let me -- if you could, just go back a little bit as far as -- you said there are towers inside the wall.

How many towers are inside the wall?

A On each side of the institution, there are 5 inside. Those towers -- inside, they have a 12 gauge shotgun, and a 37 millimeter. The first round of the shotgun is a blank which is an audible warning. Once the blank goes off, all inmates are instructed to lay face dow. Whether they're outside, inside, on the stairs, wherever, you lay down.

If you do not comply with the blank round, then we will fire a live round which consists of rubber

pellets.

Q Describe what you mean by rubber pellets.

A Rubber pellets is a less than lethal munition which the -- travels at a rate of about 900 feet per second. When they hit, they have broken the skin and buried up in the skin, not deep. You know, you can see them. But most of the time, they're called stinger rounds, basically because that's exactly what they do, they sting. They -- it's like you're in a hornet's nest.

Q And generally, in your observation, what has been the effect when these rubber pellets are used?

A They're very effective. Our staff are instructed to -- to fire at the lower extremities from the waist down. They've been very effective in dealing with any type of disruption.

Q What other non-lethal weapons are utilized inside the wall?

A We have electronic devices which administer 50,000 volts of electricity. That includes the hand-held device call the Ultron II which -- an officer has it in his hand and he makes contact with the inmate's skin. That's more or less an escort tool.

We use what's called the Taser which will fire

darts. It has barbs on the end of the darts like fish hooks only they're straight. They bury in the skin and you can deliver 50,000 volts of electricity from up to fifteen feet away.

We have an I.C.E. shield, I-C-E, which is an electrified shield. If you do a cell entry, you pin the inmate against the wall, against the floor, the bed, wherever with the shield. If he resists, then you can activate the shield and deliver 50,000 volts of electricity.

We also have the react-belt which is an electronic belt that goes around the inmate's waist. The power pack is located in that small of the back. The officer has like a remote control. You can give the inmate an audible warning which is a beep. If the inmate does not cease in his behavior, then he can deliver 50,000 volts up to a hundred and fifty feet away for eight seconds.

Q What effect does the electrical power have when it's utilized?

A Once again, the Ultron is -- it's delivered usually from one to two seconds. That's an immediate correction. Once again, it will sting.

The Taser, which imbeds in the skin, we will do that if we have to do a cell entry rather than to go in with oak sticks like we used to do. We will administer the electronic device and instruct the inmate to lay flat on the floor. That is effective probably 98 percent of the time.

The react-belt lasts for eight seconds which will take an inmate down to his knees.

Q These non-lethal weapons that you've described with the implementation of the level system, compare the effectiveness of those versus the effectiveness of the prior tactics that were used.

A Well, basically prior to the levels -- level system and the use of less than lethal weapons, inmates pretty well ran the prisons. You would have -- gangs were a problem, which gangs here are not a problem.

The staff are -- we are in control and we maintain control. We -- to give you an example of that, we had a group of Connecticut inmates in which 67 refused to leave the yard. It was a group demonstration.

With the use of the rubber pellets, the K-9s, and the electronic devices, their disturbance lasted less than three minutes.

Q That was a disturbance involving 69 (sic) inmates?

A Yes.

Q You discussed briefly, before I directed you away, about the movements within or inside the wall. Can you expand a little bit on that? You said it's groups of not more than 85.

What other precautions are taken with regard to the movements in the facility?

A Inmates walk in a single file line. If they are going to the upper tier, all movements -- all group movement is in single file. You don't have crowds or groups of inmates together.

There are red lines on the sidewalks and inside the buildings which are unauthorized areas for inmates. An inmate steps into an unauthorized area, he's met with immediate fire power. Very restrictive.

We have a dress code -- shirt tails in, pants pulled up. Very, very restrictive as far as movement, sanitation, and dress code.

Q When you describe those controlled movements, those are for the general population?

A Yes.

Q What other population exists in the facility there?

A We have administrative segregation. This is -- Wallens Ridge, as a whole, has the problem inmates of the department.

Administrative segregation is the problem inmates of Wallens Ridge. They're in their cell for 23 hours a day. They get five hours a week of outside recreation, which is basically a cage with the top open where they can look up and see the sky.

Anytime there's movement out of administrative segregation they are strip searched before they come out, they are restrained before they come out, they are escorted by two officers with one officer having the Ultron, the 50,000 volt Ultron in contact with the inmate at all times.

Q How many showers are these segregated inmates entitled to?

A They're given three a week.

Q When you say restrained movements, what does that mean?

A Inmates will have their hands cuffed behind their back before the door is opened. They will be

instructed to go down on their knees. They go down on their knees on the floor. The door is opened. Two officers there, they'll put the leg irons on the inmate, help him back up, there'll be an officer on each arm with the Ultron in the back.

Q That is any time they leave their cell?

A Any time.

Q What would cause somebody to be in a segregated population?

A Assault on another inmate, assault on staff, habitual violation of institutional rules. If the inmate is fearful to be in the general population, which a lot are, then we will put them in segregation, or if they're under investigation for some reason.

Q How or what method do they get back in the general population?

A They'll have to go through the Institutional Classification Committee. We have one written rule as far as administrative segregation. If an inmate assaults an officer, and by that I mean physically strikes, puts his hand on him, or him or her, or uses a weapon, they will have at least five years in administrative segregation.

Q With regard to the segregation population,

what is the typical duration of time in segregation?

A Once again, depending on why you're in there, if you got in a fight another inmate, then you will spend approximately 30 days.

If you assaulted another inmate depending on how you did it -- you know, we treat each case individually -- approximately two years. If you assaulted an inmate with a weapon, then you will stay in five years.

If you spit on an officer, then you will probably be there a year. If you physically put your hands on an officer, then you will be there for five years.

Q Let me direct your attention to the security with regard to the perimeter of the facility.

What is the approach with regard to your facility concerning observation and blind spots?

A On the inside of the prison, not only was it designed to provide a clear line of sight to all areas, but also a clear line of fire to where we could respond to any situation on the inside of the walls with rubber pellets.

Now, on the outside, along the perimeter fence, is that what you're meaning?

Q Yeah, that was my question; correct.

A Okay. There are two gun towers which are armed with lethal force, A.R. 15s. We have an alarmed fence, we have a shaker system and a taut wire fence which both are alarmed. We have a perimeter patrol vehicle armed with a 12 gauge shotgun with number 4 buckshot, and a .38, which drives around the institution 24 hours a day.

Q That's the motorized patrol?

A Yes.

Q In the towers, they use lethal force?

A Yes. A.R. 15s, .223 caliber.

Q You mentioned fences.

How many fences are there?

A There are two fences. The inner fence is a taut wire fence, which -- strands of barbed wire and if the barbed wire is moved at half an inch or more, someone trying to separate it or climb over it, it will alarm.

The outer fence is a shaker system. If the fence shakes, the outer fence is fourteen feet high. If it shakes with someone climbing on it, it will alarm.

And in between the fences are -- is a rock barrier which prevents someone from running in between the fences. And there are also eleven -- eleven rolls of

concertina wire at the base of the fence and three at the top.

Q To your knowledge, is this type of fence system employed anywhere else?

A Yes, it's built by Detection, which is a company from Israel, and this is the same type fence that the Israeli government put on the Golan Heights.

Q Where is Wallens Ridge situated physically?

A Wallens Ridge is located in Wise County, approximately thirty-five miles from the Tennessee border, approximately twenty miles from the Kentucky border. We are situated on top of a mountain which is called Wallens Ridge with an elevation of 2,900 feet.

Q What type of terrain is around the facility?

A Very steep mountainous terrain.

Q How often, in your experience, have escapes been attempted from that facility?

A I have not known of any.

Q Now, you described your staff essentially quelling a situation earlier.

How would you describe your staff is trained?

A I have a very professional staff. They are -- I consider them the elite. This is a very tough place to

work. The type inmates we have -- we have the worst inmates for Virginia, Connecticut, New Mexico, and Hawaii.

Staff are taught to respond immediately. The number one priority here is safety and control. We do have some rehab programs available, but our primary objective is safety and control. My staff are highly trained, highly motivated, and do an excellent job.

Q What type of training do they undertake?

A We go through a training process as far as the initial training, which consists of ten weeks, and then each year we have forty hours a year of in-service training. And then each -- prior to assuming the shift, we have a Muster, which we do a roll call and we do about a fifteen minute refresher training before they go on duty.

Q Now, when an inmate originally, or I should say, initially arrives at Wallens Ridge, where are they -- where is he or she sent?

A He'll go through our intake process, which he will be strip searched, x-rayed, x-rayed to determine if he has any items hidden up his rectum or if he swallowed anything.

He'll go through the orientation process and

he will be placed in administrative segregation for the first seventy-two hours.

Q So, the first exposure the inmate gets is to the segregation?

A Yes.

Q Let me redirect you a little bit.

What would be the difference is security between a level 6 and a level 5 facility?

A Level 6 facility has, as I described, very restricted movement. Level 5 also has the less than lethal -- the rubber pellets, the electronic devices, the pepper spray, such as we have, but they are -- their movement is not as controlled.

There's no single file movements, they can meet in groups to have drug programs, alcohol programs, sex offender programs. They can go to the library. The movement is not as restricted.

Q The way an individual would get from a level 6 to a level 5, is it safe to say -- is if they are considered less dangerous?

A Yes.

Q They will come to a -- if he comes to a level 6, depending on why he's coming here. If he has assaulted

a staff member at another institution, then he's going to be here for five years at least.

If he's just initially assigned here because of his crime, which we house inmates with eighty-five years or more, or inmates with severely disruptive behavior -- if they come here and behave themselves and do as we ask them to do for twenty-four months, then they will be considered for a transfer to a less secure facility.

Q Whose consideration decides that?

A That will be the Institutional Classification, myself, and then it will go to the Central Classification in Richmond.

Q Now, since implementation of this level system, are you aware of any escapes from a level 4 or 5 or 6 prison?

A I think the last escape we had was from a level 3, which is Augusta Correctional Center. An inmate went out in the trash. He got in the trash bin and was -- other inmates put him in the dumpster and he got out.

Q That was a level 3?

A That was a level 3. I'm not aware --

Q That's a level a capital murder lifer wouldn't

be entitled to achieve; correct?

A That's correct.

Q But there were none that you know of in levels 4, 5 or 6?

A None, no.

Q Any assaultive deaths in levels 4, 5 or 6?

A Yes, yes. There was one death in a level 4.

Q When was that?

A I'm aware of two deaths in level 3s, and one in a 4 within the past twelve months because we have all three of those inmates.

Q With regard to the one in the level 4, what happened in that situation?

A The circumstances?

Q As best you know them.

A It was a -- basically a human sacrifice. It was a inmates that were involved in satanic ritual and they sacrificed him.

Q It was some kind of a cult type of ritual?

A Yes.

Q It wasn't based on an arbitrary attack?

A No, no. They stabbed him thirty-seven times in the chest.

Q As some kind of cult sacrifice, is that what you said?

A Yes.

MR. PETROVICH: Your Honor, at this time, I have no further questions of Mr. Young.

THE COURT: All right. Mr. Morrogh?

MR. MORROGH: I just have a few, Your Honor.

CROSS EXAMINATION

BY MR. MORROGH:

Q Warden, my name is Ray Morrogh, and I'm with the Commonwealth's Attorney's office.

A Yes, good morning.

Q Good morning, sir. I just have a few questions.

As I understand your testimony, there are occasions in level 6 confinement where inmates assault other inmates; is that correct?

A Yes, that's correct.

Q And sometimes they use weapons; is that right?

A That's correct.

Q Sometimes are they -- I think they call them shanks in prison?

A Yes.

Q And those are sort of homemade knives?

A Those are homemade knives. They can be made out of metal, plastic. Inmates are very resourceful.

Q I take it, unfortunately, that on occasion, guards are assaulted by inmates as well; is that correct?

A That is correct.

Q And corrections work, particularly at a level 6 facility sounds like quite dangerous work; is that correct?

A Yes, it is.

Q Was there recently a plot uncovered at Wallens Ridge where some inmates were plotting to hurt a guard?

A Yes.

Q Were they planning on killing the guard?

A Yes.

Q That was uncovered due to security measures at the institution?

A That's correct, yes.

Q Warden, when an inmate first comes to your facility after being sentenced, let's say, to life on a capital murder charge, is there a group of people who classify him as either a level 6 or a level 5?

A Yes, that's correct.

Q And is it comprised of, I'm going to guess maybe corrections officials and perhaps a psychologist?

A Yes.

Q There is some subjectivity to their judgment in that; is that correct?

A Yes, somewhat, yeah.

Q Then if an inmate is once classified at a level 6 or 5 and there comes a time because of, let's say, good behavior, that the inmate is to be reclassified, then the psychologist, the corrections officials, and yourself, as well as officials in Richmond, would then make a judgment as to whether a transfer would be appropriate?

A That is correct.

Q So, as many as five or six people might be involved in that decision?

A Approximately at the institutional level, there will be -- including myself, there will be four and in Richmond, probably three.

Q Again --

A About seven, about seven.

Q And again, that judgement would involved some subjectivity insofar as you would bring your professional judgment to bear as would the other people involved in

making the recommendation?

A Correct.

MR. MORROGH: Your Honor, I have no further questions.

Thank you, Warden.

THE WITNESS: Thank you, sir.

THE COURT: Mr. Petrovich, any --

MR. PETROVICH: I'll try to keep it brief, Your Honor.

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY MR. PETROVICH:

Q Mr. Young, with regard to the level 6 facility, you said in your testimony that that involved essentially only the bad apples; correct?

A Correct.

Q Those are the people the prison system considers the most dangerous?

A Correct.

Q And when you're saying there are assaults, these are essentially assaults, inmate against inmate; correct?

A Well, it -- what we classify as an assault, if

you're talking about an assault being with a weapon, on staff, Wallens Ridge has had one. That officer was stabbed in the thigh.

Our sister institution, Red Onion has had three, the most serious being an inmate stabbed an officer in the chest seven times. But primarily, the assaults with the weapons are directed inmate on inmate.

Q With regard to the plot that you described or that was disclosed on cross examination, nothing ever materialized with regard to that plot; correct?

A No. We were made aware of the situation and we dealt with it.

Q With regard to the assaults that you say sometimes occur, there have not been any life threatening injuries, is that safe to say?

A Not here, no. I think there was one at Red Onion. An inmate put an adapter to a -- a T.V. adapter in a sock and beat another inmate with it. I think the inmate lost an eye, but he lived.

Q Okay.

MR. PETROVICH: Your Honor, at this point I have no further questions.

THE COURT: All right, sir.

Mr. Morrogh, anything further?

MR. MORROGH: Nothing further, sir.

THE COURT: All right.

Mr. Young, thank you very much.

THE WITNESS: Thank you, sir.

THE COURT: Yes, sir.

THE WITNESS: Bye.

(Witness excused.)

THE COURT: Counsel, I've received and reviewed the memoranda. Is there any -- and I think we may have had some oral argument last time.

Is there any other argument, Mr. Petrovich, that you haven't made that you wish to?

MR. PETROVICH: Your Honor, if I could summarize briefly --

THE COURT: Yes, sir.

MR. PETROVICH: Points may be redundant, but I just would like to emphasize and I will try to keep it down.

THE COURT: That's fine.

MR. PETROVICH: Your Honor, essentially the motion is based on a due process right to rebut future dangerousness evidence that will be proffered by the

Commonwealth's Attorney.

What we're talking here is rebuttal evidence. This testimony will be offered in rebuttal. This is not general mitigation testimony that of course is also offered during the sentencing phase of a capital murder trial.

This is going to be in response to the Commonwealth's proffer that he essentially poses a future -- a risk of a future danger to society. When we talk about that serious threat to society, future danger to society, two issues arise and we talked about this last time.

First of all, there's the general risk. There's general society, essentially what we're talking about is escape. What is the risk of escape? And when we met last time that was fresh in everyone's mind with regard to the Texas seven.

And I think it's important that a jury know when they're considering future dangerousness what are the chances of an escape. What are we talking about? Where will they be escaping from? What measure will be taken to prevent these escapes? What type of facility will they be in? What will this be like?

All those things go through someone's mind when they consider whether or not there will be a threat to general society and whether escapes are a possibility.

The other issue with regard to the society is the prison society and what is the danger to the society "inside the wall," in quotes. Again, the Warden's testimony would be offered to give them that mental picture, to give them an idea.

Most people don't know what prisons are like. Most people have no idea. They see things in television. They see programs on HBO that show behavior that might not be accurate as far as what actually happens in a prison. And I think it's important that they be given a good accurate picture and I think Mr. Young provides us with that picture.

He's very knowledgeable. He's been in the system for twenty years. He's the Warden at Wallens Ridge and as you heard him testify, he teaches a course. He knows his business.

The other point I'd like to hit is there are two cases brought up by the Commonwealth Attorney. They're both the most recent authority, somewhat indirectly on the subject matter, Cherrix and Walker. My

position is those cases are not on point. Those cases are cases where the testimony -- the evidence was offered as general mitigation evidence, not as rebuttal to the future dangerousness proffer -- not proffer, but future dangerousness evidence.

This will be again, rebuttal. And I once again direct the Court's attention to Vinson -- I'm sorry, Vinson v. Commonwealth. That was 258 Virginia 459. That was a 1999 case and the Court there essentially said -- it was the Commonwealth that was given the opportunity to rebut defense evidence on future dangerousness and that's what we're asking for, that same constitutional right to rebut the future dangerousness evidence, Your Honor.

THE COURT: How old is Mr. Fisher?

MR. PETROVICH: I don't know off the top of my head.

DEFENDANT: Twenty-nine.

MR. PETROVICH: Twenty-nine.

THE COURT: Let's assume Mr. Fisher has a life expectancy of forty years. What's Wallens Ridge or Red Onion going to be like in ten years or twenty years from now?

MR. PETROVICH: I don't know, Your Honor.

Based on the Warden's testimony, the system that has been implemented has met with tremendous success and he anticipates that it's going to be around for a long time. Maybe in the future -- I can't -- we all know I can't predict the future. No one can.

THE COURT: And part of my -- part of the hurdle for you in this case is for me to decide that any of this testimony would not be speculative as to what the conditions that he would find himself in are five, ten or twenty years from now.

How do overcome that hurdle?

MR. PETROVICH: Well, I understand that's a difficult quandary. I don't have the direct answer to that, Your Honor, but the one thing I'll point out is the code, in this proceeding, the sentencing phase, asks the Jury to predict the future. They ask the Jury to determine whether or not he will pose a future danger, so they have to predict the future. So, they don't have those accurate barometers either as far as ten, twenty years down the road. So the best we can do is offer what the future may be like based on current circumstances.

I think at least then we'll have -- at least they'll have an idea what the present is like to

extrapolate the future. Right now, they don't even have what the present is like. They are asked to predict the future with regard to that issue. That's something that the legislature has mandated.

THE COURT: All right, sir. Thank you.

Mr. Morrogh?

MR. MORROGH: Your Honor, just very briefly. I basically stand on my prior argument in the brief motion -- or excuse me, response that I filed, but I did want to point out that on page 14 of the Cherrix opinion, 257 Virginia, at 292, and I note that the most recent Lawyers Weekly indicates that apparently a habeas has been granted in that case, but it's on an unrelated issue about DNA in the Eastern District.

But, the Defendant did seek to introduce the prison life evidence on the issue of future dangerousness as well as mitigation evidence and I'm just reading a sentence from page 14 and it says, "Cherrix sought to present evidence regarding prison life and its effect on his quote, 'future dangerousness' through the testimony of an expert penalogist, several Virginia Corrections officials, a criminlolgist, a sociologist, and an individual serving a life sentence in the custody of the

Virginia Department of Corrections."

And on page 15, Court goes on to note that it was the Department of Corrections officials who would have testified, quote, "regarding the ability of the penal system to contain Cherrix and the cost to the taxpayers of an inmate's life sentence."

So the ability to contain the Defendant I would think would have been in the Defendant's argument in that case, relevant to the future dangerousness issue, and the Supreme Court rejected that in the Cherrix case, so that was raised in the Cherrix case.

But, really, Your Honor, the bottom line is, I would submit it's just speculative. It depends on how they classify him as to where he goes. It depends on so many different factors and as the Court accurately points out, we don't know what the system will be in the future with the change in administrations in the government and so forth.

It invites the Jury to speculate and I ask the Court not to allow this evidence, because I'd submit it would muddy the issues.

THE COURT: All right, sir.

Mr. Petrovich, anything further?

MR. PETROVICH: Just briefly, Your Honor. I know that warning is in the Cherrix opinion, but I would just ask the Court to consider that Cherrix opinion as a whole. I think the Court viewed it as general mitigation evidence when you read all of it. I'm not going to sit here and read the whole section of the opinion that relates to our issue. I'm sure the Court already has.

But I don't think the same type of constitutional analysis with regard to the presentation of the sentencing evidence was applied and argued, and I think that's an important distinction -- that the evidence would be offered in rebuttal.

The distinction, as I said, relates back to the Vinson case where the Commonwealth was entitled to rebut defense evidence of future dangerousness and I think that type of dynamic, that type of interaction is an important distinction.

I know the words are thrown around a little bit as far as mitigation and future dangerousness, but it's not the same type of exact interplay between the presentation of the evidence that the Court writes about in the opinion and I would ask the Court to consider that.

THE COURT: All right. I'll take the matter

under advisement. I'll let you all know as promptly as I can.

Let me ask, I know the matter is set for trial on April the 16th. We've had some things that have arisen during the life of this case that have resulted in it being continued on a few occasions previously.

I would simply ask if counsel see anything on the horizon that at present you believe makes it likely that I would hear another continuance motion?

MR. MORROGH: I don't think so, Your Honor.

MR. PETROVICH: Your Honor, I would also --

THE COURT: I mean reports back that are supposed to be back, studies that are supposed to be done in -- that sort of thing?

MR. MORROGH: The report is back from the lab and they find no blood or material on the shirt and at this point I believe counsel may want the garment transferred to Cellmark, which the police are willing to do.

THE COURT: Mr. Arif?

MR. ARIF: I have a call into Cellmark to find out how they want it transferred, whether they want the police to bring it or if they will accept just my carrying

it over and I think Judge, they permitted us to fast track it and they will have it certainly during the course of the trial at the latest.

THE COURT: All right.

How about in terms of any psychological evaluations that are supposed to have been done. Are all those taken care of?

MR. MORROGH: I didn't do mine, Your Honor, but I'm willing to waive it.

THE COURT: Mr. Petrovich?

MR. PETROVICH: Yes, Your Honor.

THE COURT: They're all taken care of?

MR. PETROVICH: Yes.

THE COURT: Okay. How long do you expect -- putting aside the issue of jury selection, which I know this will be a little unpredictable to know how long that'll take. How long does the Commonwealth expect its case in chief to take?

MR. MORROGH: Four days, Your Honor.

THE COURT: And from the defense side, I'm not asking for a number of witnesses or anything, just would you expect something that or less?

MR. PETROVICH: Excluding sentencing --

THE COURT: Yes, just guilt/innocence phase.

MR. PETROVICH: I would guess probably about two days.

THE COURT: Okay. I'll certainly block off those two weeks. We're starting on a Monday and I think we need to assume that we'll be here for at least those two weeks and I'll -- we'll impanel a jury with that in mind, but I just wanted some sense of that.

I'm available between now and then. I don't think I'm off anytime between now and then so if you need anything that comes up, rather than trying to find a motions day, which I'm hearing criminal matters, just call my clerk, as I think you've done in the past, and I'll make sure it gets heard promptly.

MR. MORROGH: Thank you, Your Honor.

MR. PETROVICH: Thank you, Your Honor.

THE COURT: Thank you.

MR. PETROVICH: Your Honor, with regard -- and I apologize, I arrived late. I just wanted to explain to the Court it wasn't out of lack of respect or anything like that. I had another matter down in 4 -- I'm sorry, up in 5F that I had to just take care of that was already scheduled, and I apologize to the Court for that.

THE COURT: I didn't take it as a matter of any lack of respect.

MR. PETROVICH: All right.

Thank you, Your Honor.

THE COURT: Yes, sir.

(Whereupon, at approximately 10:52 o'clock a.m., the hearing in the above entitled matter was concluded.)

CERTIFICATE OF REPORTER

I, Jamie L. Portela, the Verbatim Reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this day of , 2000.

Jamie L. Portela
Verbatim Reporter

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	
v.	Case No. 102888
	The Hon. Jane Marum Roush
LEE BOYD MALVO,	
Defendant.	

MOTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DECLARE JUVENILE DEATH PENALTY UNCONSTITUTIONAL

COMES NOW, the Defendant, Lee Boyd Malvo, by counsel, and moves this court pursuant to the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Section 9 of the Constitution of Virginia to declare the death penalty unconstitutional as applied to juvenile offenders and strike death from the case. Juvenile offenders are those defendants who were under the age of eighteen at the time of the offense charged. In support of this Motion, Defendant asserts the following:

I. Summary of Argument

The execution of juvenile offenders constitutes "cruel and unusual punishment" in violation of the Eighth Amendment as incorporated to the states by the Fourteenth Amendment of the United States Constitution and Article 1, Section 9 of the Constitution of Virginia. The United States Supreme Court recently held that the execution of mentally retarded offenders is an unconstitutional cruel and unusual punishment in Atkins v. Virginia, __ U.S. __, 122 S. Ct. 2242 (2002). Facts and circumstances regarding the execution of juvenile offenders are directly

analogous to those facts regarding the execution of mentally retarded offenders on which the Court based its holding in Atkins. As with executions of the mentally retarded, the juvenile death penalty contradicts evolving standards of decency, does not effectuate the punitive purposes of capital punishment, and presents a grave risk of executing individuals innocent of capital crimes. Therefore, this Court should declare the juvenile death penalty unconstitutional and, because Defendant was not eighteen at the time of the charged offense, strike death from this case.

II. The Legal Standard for Cruel and Unusual Punishment – Evolving Standards of Decency

The full text of the Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted." A punishment is "cruel and unusual" when it is excessive and disproportionate to the crime, as judged by the current societal standards of decency.[1] Early in the twentieth century, the United States Supreme Court expounded on the proportionality requirement when it stated that it is "a precept of justice that punishment for crime should be graduated and proportioned to the offense." Weems v. United States, 217 U.S. 349, 367 (1910). In reaching this conclusion, the Court noted that the cruel and unusual punishment clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." Id. at 373-374. Chief Justice Warren rephrased this principle when he wrote that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-101

[1] This concept has been codified by Va. Code Ann. § 17.1-313, directing the Virginia Supreme Court's mandatory review of all death sentences imposed.

(1958).

The U.S. Supreme Court has used societal standards of decency to find that the Eighth Amendment imposes substantive limitations on capital punishment for certain crimes or on certain classes of defendants. See Tison v. Arizona, 481 U.S. 137 (1987) (holding that, to receive the death penalty, a defendant must have a *mens rea* of at least reckless indifference to human life and an *actus reus* of at least major participation in the killing); Enmund v. Florida, 458 U.S. 782 (1982) (holding capital punishment excessive for defendant who lacked intent to kill); Coker v. Georgia, 433 U.S. 584 (1977) (holding capital punishment excessive for defendant who committed rape). Most recently, in Atkins, the Court held "that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Atkins, ___ U.S. at ___, 122 S. Ct. at 2252 (quoting Ford v. Wainright, 477 U.S. 399, 405 (1986)). In reaching this conclusion, the Court relied on three lines of reasoning: (1) prevailing standards of decency forbid the execution of a mentally retarded defendants; (2) mentally retarded defendants "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct;" and (3) mentally retarded defendants are less capable of assisting in and securing the type of defense required in capital cases and therefore present an increased chance of death sentences being imposed on defendants who did not actually commit a capital offense. Id. at ___, 122 S. Ct. at 2244. A substantive proscription against the juvenile death penalty is similar to the ban against executing the mentally retarded because it is based on the characteristics of a class of defendants. Therefore, the rational of Atkins is the proper analytical framework for determining whether the juvenile death penalty is cruel and unusual.

In the late 1980s, the United States Supreme Court twice addressed the issue of what is

the proper age for a death eligible defendant. In Thompson v. Oklahoma, 487 U.S. 815 (1988), the Court held that the execution of fifteen-year-old offenders constitutes cruel and unusual punishment in violation of the Eighth Amendment. In Stanford v. Kentucky, 492 U.S. 361 (1989), the Court held that the Constitution did not prevent a state from sentencing a sixteen or seventeen-year-old to death. Both decisions examined whether such executions violated evolving standards of decency. As in Thompson, Stanford examined whether the actions of legislatures and juries indicated a national consensus and an evolving standard of decency against the juvenile death penalty. Id. 369. The Stanford Court found no national consensus because a majority of the states that permitted capital punishment also permitted the juvenile death penalty. Id. at 370-371. However, the thirteen-year-old standard of decency from Stanford is outdated and has evolved. The current standard of decency forbids the execution of juvenile offenders.

III. Indications of an Evolving Standard of Decency Against the Juvenile Death Penalty

A. Legislative Prohibitions

The Court has stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Penry v. Lynaugh, 492 U.S. 302, 331 (1989). Thus, the laws passed by legislatures are the best evidence of the current standard of decency. These laws indicate that the majority of states flatly reject the juvenile death penalty and that the practice violates the Eighth Amendment. In fact, the large number of states that forbid the juvenile death penalty parallels the number of states that forbade the execution of the mentally retarded when Atkins was decided. In Atkins, the Court found that the legislative proscriptions of thirty-one jurisdictions (thirty states and the federal government) against executing the mentally retarded indicated a national consensus and an evolving standard of

decency against such executions. Atkins, ___ U.S. at ___, 122 S. Ct. at 2248-2249. Today, twenty-nine jurisdictions forbid the juvenile death penalty. Twelve states do not provide the death penalty at all.[2] Of the thirty-eight states that authorize capital punishment, fifteen have statutes that proscribe executions of juvenile offenders.[3] Additionally, the Supreme Court of the State of Washington judicially banned such executions. State v. Furman, 858 P.2d 1092 (Wash. 1993). The Federal Government also sets the minimum age for the imposition of the capital penalty at eighteen. 18 U.S.C. § 3591(b); 21 U.S.C. § 848(l). Indeed, in Atkins, the Court stated, "the large number of states prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable that the average criminal." Atkins, ___ U.S. at ___, 122 S. Ct. at 2249. Thus, the large

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[2]Stanford did not include non-death states in the calculation of states that did not permit the juvenile death penalty because it found that these states had not considered what was the appropriate minimum age for the imposition of capital punishment. Stanford, 492 U.S. at 370 n.2. This reasoning is mistaken because a state that determines all forms of capital punishment are inappropriate necessarily determines that the juvenile death penalty is inappropriate. Atkins differed from Stanford by including non-death states in the calculation of states that did not permit the execution of the mentally retarded. Therefore, in determining the existence of a national consensus, the Atkins rationale should apply and computations of states that ban the juvenile death penalty should include states that ban all forms of the death penalty.

[3]The following states statutorily preclude death sentences for offenders under the age of eighteen: California (CAL. PENAL CODE ANN. § 190.5(a) (West 1999)); Colorado (COLO. REV. STAT. § 16-11-103 (Supp. 1996)); Connecticut (CONN. GEN. STAT. § 53a-46a(h)(1) (2001)); Illinois (ILL. COMP. STAT. ANN. CH. 720 § 5/9-1(b) (West Supp. 2002)); Indiana (IND. CODE ANN. § 35-50-2-3(2) (Michie 2002)); Kansas (KAN. STAT. ANN. § 21-4622 (1995)); Maryland (MD. CODE ANN., CRIM. LAW § 2-202(b)(2)(i) (2002)); Montana (MONT. CODE ANN.§ 45-5-102(2) (2001)); Nebraska (NEB. REV. STAT. § 28-105.01(1) (1995)); New Jersey (N.J. STAT. ANN. §§ 2A:4A-22(a) (West Supp. 2002), 2C:11-3(g) (West Supp. 2002)); New Mexico (N.M. STAT. ANN. §§ 28-6-1(A) (Michie Supp. 2000), 31-18-14(A) (Michie Supp. 2000)); New York (N.Y. PENAL § 125.27(1)(b) (McKinney Supp. 2002)); Ohio (OHIO REV. CODE ANN. §§ 2929.023 (West 1997), 2929.03 (West 1997)); Oregon (ORE. REV. STAT. § 137.707 (2001)); Tennessee (TENN. CODE ANN. §§ 37-1-102(4) (Supp. 2002), 37-1-103 (2001), 37-1-134(a)(1)(2001)).

number of states prohibiting the juvenile death penalty also indicates that society views juveniles as less culpable and undeserving of the death penalty.

Furthermore, the trend against the juvenile death penalty has been uniform and consistent since Stanford. Montana raised its death-eligible age to eighteen in 2001 while Indiana followed suit in 2002. MONT. CODE ANN. § 45-5-102; IND. CODE ANN. § 35-50-2-3. New York and Kansas set the minimum death-eligible age at eighteen when they re-instituted their versions of the death penalty. N.Y. PENAL § 125.27(b); KAN. STAT. ANN. § 21-4622. The Supreme Court of Washington abolished the juvenile death penalty in 1993. Furman, 858 P.2d at 1092. Additionally, legislation to ban such executions has been introduced recently in nine other states.[4] No state has sought or instituted legislation lowering the minimum age for capital offenders below eighteen. These facts indicate that standard of decency has evolved consistently in a direction away from the execution of juvenile offenders. The Court found this fact important in Atkins when it stated that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." Atkins, ___ U.S. at ___, 122 S. Ct. at 2249.

The pace of legislative proscriptions regarding the execution of juveniles is effectively indistinguishable from that regarding the mentally retarded. In Atkins, the Court attempted to distinguish the level of a the national consensus against executing the mentally retarded from that

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[4]See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973- September 30, 2002, at* www.law.onu.edu/faculty/streib/juvdeath.htm. (Oct. 9, 2002) (hereinafter Streib, *Juvenile Death Penalty*). In the 2002 legislative year, bills were proposed in the following states to raise the minimum age for capital offenders to eighteen: Arizona (SB 1457; HB 2302); Florida (CS-SB 1212; HB 1615), Kentucky (HB 447; SB 127); Mississippi (HB 167); Missouri (SB 819; HB 1836); and Pennsylvania (SB 27). In the 2001 legislative year bills were introduced in Arkansas (SB 78); South Carolina (Bill 236); and Texas (HB 2048).

of executing juvenile offenders by noting that, since 1988, eighteen states passed statutes proscribing the execution of the mentally retarded whereas only two states raised the minimum age for imposition of death. Atkins, ___ U.S. at ___, 122 S. Ct. at 2249 n.18. This analysis is mistaken for two reasons. First, it ignores both the decision of the Supreme Court of Washington and the fact that New York and Kansas forbade the practice when they instituted capital punishment statutes. Second, before 1988 no state banned the execution of the mentally retarded, whereas twelve states had laws forbidding the execution of defendants who committed their crimes before the age of eighteen. Stanford, 492 U.S. at 370 n.2. That is, in 1988 the country was closer to a national consensus against the juvenile death penalty than it was to one against the execution of the mentally retarded. The new decisions of just a few state courts to ban juvenile executions raise the numbers of such states to parallel that of Atkins and demonstrate a shift to a national consensus against that practice.

Further, Atkins found that legislation prohibiting the execution of the mentally retarded "carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition." Atkins, ___ U.S. at ___, 122 S. Ct. at 2249. Legislatures that recently have addressed the juvenile death penalty have opposed it overwhelmingly. The vote against the juvenile death penalty in Indiana was 44-3 in the Senate and 83-10 in the Assembly. The Montana prohibition passed 44-5 in the Senate and 85-15 in the Assembly. In 2002, the Florida Senate voted 34-0 to ban the juvenile death penalty but the House of Representatives did not vote on the measure before the end of the session; the Florida House of Representatives had approved the measure in 2001. The Texas House passed its bill 72-42 before the legislation stalled in the Senate.

B. Imposition of Juvenile Death Penalty and Jury Sentences of Death for Juvenile Offenders

In Atkins, the scarcity of executions of the mentally retarded indicated the national consensus against the practice.

> [I]t appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less that 70 since [1989]. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

Atkins, ___ U.S. at ___, 122 S. Ct. at 2249 (footnote omitted). The small number of states that have executed juvenile offenders parallels that of states that have executed the mentally retarded. Only seven states have executed a juvenile since 1973 and only six states have done so since 1989. Streib, *Juvenile Death Penalty* at 3-4. Furthermore, in states that have executed juvenile offenders, such executions are extremely rare. Georgia, Louisiana, Missouri, Oklahoma and South Carolina each have executed only one juvenile. Id. Only Texas and Virginia have executed more than one juvenile offender with Texas responsible for thirteen such executions and Virginia responsible for three. Id. In other words, if Texas and Virginia are removed from the calculation, just five juvenile offenders have been executed in the United States since 1972.

Moreover, death sentences by juries for juvenile offenders are scarce and this scarcity indicates a national consensus against the practice. See Thompson, 487 U.S. at 832; Atkins, ___ U.S. at ___, 122 S. Ct. at 2253 (Rehnquist, C.J., dissenting). Historically, death sentences have been rare for juvenile offenders. Delaware, Idaho, New Hampshire, South Dakota, Utah, and Wyoming have never sentenced, let alone executed, a juvenile offender despite permitting the imposition of such sentences. Strieb, *The Juvenile Death Penalty,* at 14-19. Just three states are responsible for roughly half of the 224 juvenile death sentences since 1973. Id. at 9. Nationally,

the seven juvenile death sentences in 2001 comprised 4.5 percent of all death sentences that year and the four juvenile death sentences in 2002 were just 2.6 percent of that year's total. Id. Presently there are eighty juvenile offenders on death row in only fifteen of the twenty-two states that permit the juvenile death penalty. Id. at 11. Texas has the largest number of juvenile offenders on death row with twenty-eight, or one third of the total in the nation. Id. at 26. Thus, death sentences for juvenile offenders are rare or unusual and occur only in a few, isolated states. The practice of these states does not indicate national acceptance of the juvenile death penalty, but rather directly contradicts the national consensus against it as is indicated by the practice of the many states that do not permit or do not impose such sentences.

Even in Virginia, the only state other than Texas to execute more than one juvenile offender, jury sentencing of juveniles to death is uncommon. Virginia has sentenced five juvenile offenders to death. Id. at 10. Justice Hassell of the Supreme Court of Virginia dissented from the opinion upholding the sentence of Chauncy Jackson, the only sixteen-year-old offender among these five, because the sentence was "excessive and disproportionate" for killers of the defendant's age. Jackson v. Commonwealth, 499 S.E.2d 538, 557 (Va. 1998) (Hassell, J., dissenting). Justice Hassell noted that nine other sixteen-year-old offenders had pleaded to or been convicted of capital murder but the death sentence was imposed only in Jackson's case. Id. at 652. In addition to the cases noted by Justice Hassell, Virginia juries imposed life sentences on at least three additional juvenile offenders after convicting them of capital murder.[5] The life

[5]Additional juvenile offenders convicted of capital murder and sentenced to life imprisonment in Virginia are: Stephen M. Sneade (sixteen-years-old), see Sneade v. Commonwealth, No. 1105-99-2, 2000 WL 1486567 (Va. Ct. App. Oct. 10, 2000) (the jury found both aggravating factors of future dangerousness and vileness); Lorenzo McLean, (seventeen-years-old), see McLean v. Commonwealth, 516 S.E.2d 717 (1999) (the jury found both aggravating factors of future dangerousness and vileness); and Walter J. Keil, (sixteen-years-

sentences of these twelve juveniles indicate that juries in Virginia predominantly choose to sentence juveniles to life imprisonment rather than death. Thus the scarcity of the imposition of the juvenile death penalty and jury imposed juvenile death sentences indicates that the practice is cruel and unusual.

C. International Standards of Decency

The opinion of the international community is relevant to the determination of evolving standards of decency. See Thompson, 487 U.S. at 830; Enmund, 458 U.S. at 796-797 n.22; Coker, 433 U.S. at 596 n.10; Trop, 356 U.S. at 103. International opinion is relevant to a national consensus because the consistency of that opinion "with legislative evidence lends further support to [the] conclusion that there is a consensus among those who have addressed the issue." Atkins, ___ U.S. at ___, 122 S. Ct. at 2249 n.21. The Atkins Court considered this factor and noted that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." Id. at ___, 122 S. Ct. at 2249 n.21.

International standards of decency with regard to capital punishment of juveniles will be the subject of a Motion and Memorandum to follow, and so Defendant refrains from fully exploration herein, without waiver of the argument that there is overwhelming international disapproval of executing juveniles.

D. Opinion of Professional, Social and Religious Organizations and Public Opinion

The Atkins Court also looked for indications of a national consensus in the opinions of

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old), see Kiel v. Commonwealth, 278 S.E.2d 826 (1981); *See* Life Sentence Project (Oct. 2002) (unpublished manuscript, on file with the Virginia Capital Case Clearinghouse) (compiling list of defendants convicted of capital murder in Virginia and sentenced to life imprisonment).

professional, social, and religious organizations with germane expertise. Atkins, ___ U.S. at ___, 122 S. Ct. at 2249 n.21. The opinions of these organizations as well demonstrate a standard of decency against the juvenile death penalty. The American Bar Association has adopted a resolution opposing the juvenile death penalty. American Bar Association, Summary of Action of the House of Delegates 17 1983 Annual Meeting). Similarly, the American Law Institute -- in § 210.6 of the Model Penal Code -- proposed excluding juvenile offenders from the death penalty; the commentary notes that "civilized societies will not tolerate the spectacle of execution of children." MODEL PENAL CODE § 210.6, Commentary, 133 (1980). In June of 2001, the Constitution Project, a bipartisan group of former judges, prosecutors, law enforcement officials, religious leaders and victims-rights advocates, released a report that included a recommendation to end the juvenile death penalty.[6]

Other professional organizations opposing the juvenile death penalty include: the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Society for Adolescent Psychiatry, the National Mental Health Association, the Children's Defense Fund, the Center on Juvenile Criminal Justice, the Child Welfare League of America, the Juvenile Law Center, and the Urban League. Numerous religious organizations also oppose the juvenile death penalty including: the American Baptist Churches, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Disciples of Christ, Mennonite Central Committee, General Assembly of the Presbyterian Church, and the United States Catholic Conference. See Stanford, 492 U.S. at 388 n.4 (Brennan, J., dissenting) (noting religious organizations filing amicus briefs for petitioners).

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[6]CNN.com, Panel Calls for Reforms to Death Penalty System, at http://www.cnn.com/2001/LAW/06/27/death.penalty.reform/index.html (June 27, 2001).

In Atkins, "polling data [showed] a widespread consensus among Americans . . . that executing the mentally retarded is wrong." Atkins, ___ U.S. at ____, 122 S. Ct. at 2250 n.21. Polling data indicates the same consensus regarding executing juveniles. Moreover, opinion poll data indicate that the vast majority of Americans oppose the juvenile death penalty. A Gallup poll from May 2002 indicates that, despite seventy-two percent in favor of the death penalty overall, sixty-nine percent of Americans oppose the juvenile death penalty while only twenty-six percent support it.[7] A poll by the Houston Chronicle reported similar results.[8] Thus, legislative action, the scarcity of juvenile death sentences and executions, and the opinion of the international community, professional and religious organizations, and the American public demonstrate a standard of decency against the juvenile death penalty and that the imposition of such a penalty in Defendant's case would be cruel and unusual punishment.

IV. The Juvenile Death Penalty Does Not Serve the Punitive Purposes of Capital Punishment

A. Juveniles are Less Culpable than Adults

Juveniles are less culpable than adults and, accordingly, their execution does not fulfill the punitive purposes of capital punishment– deterrence and retribution. Therefore, juveniles are undeserving of the death penalty. Using this very same line of reasoning, the Atkins Court found that the reduced capabilities of the mentally retarded made them less culpable and therefore

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[7]Jeffery M. Jones, *Gallup Poll In-Depth Analyses, Support for the Death Penalty in Individual Circumstances* (Aug. 2002) *available at* http://www.gallup.com/poll/analysis/ia020830ix.asp. The Gallup poll defined juveniles as those under twenty-one years of age.

[8]Steve Brewer, *Juvenile Cases: Just 1 in 4 in County Thinks Death Appropriate*, HOUS. CHRON., Feb. 6, 2001, *available at* http://www.chron.com/cs/CDA/printstory.hts/metropolitan/816391.

undeserving of death sentences. How and why should we differentiate actual juveniles from adults with juvenile mental capacity?

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Atkins, ___ U.S. at ___, 122 S. Ct. at 2250-2251 (footnote omitted). The national consensus against the juvenile death penalty indicates a recognition that juveniles, like the mentally retarded, do not possess the same level of knowledge, experience and self control as adults. The Thompson Court recognized these diminished capabilities of juveniles when it noted that, "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." Thompson, 487 U.S. at 835. The Court has also stated that, "youth is more than a chronological fact. It is a time of life when a person may be the most susceptible to influence and psychological damage." Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1981).

Recent physiological, social and psychological research supports the conclusion that these statements apply equally to sixteen and seventeen-year-old offenders. For example, one recent study indicated that juveniles engage in increased risk-taking behavior due to the developmental changes that take place in the brain during adolescence.[9] In this study, researchers compared

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[9]Frontline, *Inside the Teenage Brain, Interview With Deborah Yurgelun-Todd* (PhD, Director of Neuropsychology and Cognitive Neuroimaging at Mclean Brain Imaging Center) *available* at http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/todd.html.

Magnetic Resonance Imaging scans of youths from the ages of eleven through seventeen to adults. The scans demonstrated that the youths processed emotional information in the amygdala, a region that guides impulse related behavior, whereas adults processed the information in the frontal lobe, a region that conducts thought, planning and goal directed behavior. Accordingly, the functional capabilities of the brains of juveniles makes them less able to control impulses and more prone to act on instinct.

Additional factors negatively impact the decision making ability of juveniles, making them less able to make a reasoned decision. For example, juveniles are more susceptible to peer influence than adults. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 162 (1997). Research indicates that juveniles take more health and safety risks than adults do by engaging in behavior such as unprotected sex, drunk driving and criminal conduct. Id. at 163. Furthermore, juvenile decision making is overly focused on short-term rather than long-term consequences of the considered actions. Id. at 164. Also, "the fact that delinquent behavior desists for most adolescents as they approach adulthood strongly suggests that criminal conduct, for most youths, is associated with factors peculiar to adolescence." Id. at 172. Thus, these diminished capabilities are functions of age rather than characteristics of individual juveniles, and these limitations make juveniles less culpable, as a class, than adults. These diminished capabilities of juveniles are directly analogous to the diminished capabilities of the mentally retarded that served to decrease their level of culpability as found by the Court in Atkins. Therefore, juveniles are similarly less culpable and ineligible for the death penalty.

Science has, of course, only confirmed what has been observed of teenage behavior for centuries. It is no breakthrough to claim that teenage judgment is seriously flawed. Common

observation would tell us that is an understatement. In fact, there is little debate on that particular subject *until* the question of the criminal culpability arises. It is at *that* point that the same individuals who would not feel comfortable giving their seventeen year-old son the keys to the family car claim that another seventeen year-old, in possession of a firearm, was surely functioning at adult capacity. That is why one must be careful to note that the argument against the imposition of the death penalty on juveniles is *not* simply reducing crimes committed by teens to simply "poor judgment"; nor is the idea to compare/contrast the "average" teen to the teen facing murder charges. Likewise, the argument should not imply that all teenagers are potential criminals. It is far simpler and far less controversial than that: it is merely a fact that time, common knowledge -- and finally science -- have proven that *all* adolescents and teens have a degree of diminished judgment capacity – no one denies it until *this discussion arises* -- and therefore age *cannot* be ignored when considering whether or not a teenage defendant's culpability is the same as an adult's.

"Punishment should be directly related to the personal culpability of a criminal defendant" and if juveniles are less culpable than adults, they should face a less severe punishment. Thompson, 487 U.S. at 834 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Various jurisdictions recognize that the diminished capabilities of juveniles lowers their culpability and ability to act responsibly in many non-criminal contexts. "The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." Thompson, 487 U.S. at 835. Criminal laws also account for these reduced capabilities and hold juveniles less culpable. This fact is illustrated in the holdings of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1981) and Va. Code Ann. § 19.2-264.4(B) that require

juries to consider youth as a factor that mitigates a defendant's culpability.

B. The Juvenile Death Penalty is an Ineffective Deterrent or Retributive Punishment

The decreased culpability and capabilities of juveniles also significantly impact the punitive purposes of capital punishment. The Atkins Court identified deterrence and retribution as the punitive purposes of capital punishment. Atkins, ___ U.S. ___, 122 S. Ct. at 2251. The Court noted that, unless the imposition of the death penalty "measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." Id. at ___, 122 S. Ct. at 2251. The Court struck down the execution of mentally retarded offenders in part because there was a "serious question" whether the social purposes of the death penalty were advanced by such executions. Similarly, the juvenile death penalty does not fulfill the social purposes of the capital punishment.

"The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." Id. at ___, 122 S. Ct. at 2251. In Atkins, the Court noted that the "cognitive and behavioral impairments" of the mentally retarded, including a "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," made it less likely that a mentally retarded defendant would realize the possibility of the death penalty and be deterred by that possibility. Id. at ___, 122 S. Ct. at 2251.

The juvenile death penalty does not fulfill the purpose of deterrence because, again, juveniles share many of the same cognitive and behavioral impairments as the mentally retarded. Specifically, the propensity of juveniles to act on impulse and their general failure to consider long-term consequences demonstrate that juveniles are not capable of being deterred because they either cannot or do not consider the possibility that their actions will result in a death sentence.

As the Court noted in Thompson, because of these cognitive and behavioral impairments, "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." Thompson, 487 U.S. at 837.

The juvenile death penalty also fails as an attempt to work retributive because it is excessive and ignores the penological purpose of reformation. Retribution is society's "interest in seeing that the offender gets his 'just desserts' – the severity of the appropriate punishment necessarily depends on the culpability of the offender." Atkins, ___ U.S. at ___, 122 S. Ct. at 2251. Capital punishment is appropriately severe only when a defendant's crime reflects "a consciousness materially more 'depraved' than that of any person guilty of murder." Godfrey v. Georgia, 446 U.S. 420, 433 (1980). In Atkins, the Court stated that if "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." Atkins, ___ U.S. at ___, 122 S. Ct. at 2251. This rationale applies equally in the case of the less culpable, juvenile offender.

Furthermore, in Thompson, Justice Stevens explained that the execution of a fifteen-year-old offender did not further the purpose of retribution "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children." Thompson, 487 U.S. at 836-837. Retribution should not apply to juvenile offenders because society views, and social and psychological evidence demonstrates, that such offenders have the same lesser culpability than fifteen-year-old offenders had at the time of Thompson. Such a punishment would also ignore the juvenile's capacity for growth and society's fiduciary obligations to its children, as noted by Justice Stevens.

V. Death Sentences for Juveniles Cannot be Determined with the Degree of Reliability Required by the Constitution

The Constitution requires that death sentences be determined reliably. The potential harm of an improper death sentence is tremendous because "the penalty of death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 305 (1975). Because the penalty is irreversible, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Id. at 305. The Supreme Court of Virginia recently stressed this fact when it noted, "the trial of a capital murder case in which a defendant may be subject to the penalty of death is qualitatively different from non-capital cases." Commonwealth v. Hill, 264 Va. 315, 320, 568 S.E.2d 673, 676 (2002). Death is never the appropriate sentence for a juvenile offender because such a reliable determination is not possible.

The high reversal rate for juvenile death sentences indicates the unreliability of such sentences. There have been 224 juvenile death sentences since the modern period of capital punishment began in 1972. Streib, *Juvenile Death Penalty* at 8. Of these, eighty remain in force and are being litigated. Id. Final resolution of juvenile death sentences has occurred in 144 cases, through execution, reversal or commutation. Id. Executions occurred in twenty-one of these cases and two juvenile death sentences were commuted. Id. One hundred twenty one death sentences have been reversed. Id. Therefore, the reversal rate for juvenile death sentences is eighty five percent. This high rate demonstrates that the vast majority of juvenile offender death sentences have been wrongly imposed.

The constitutionally required reliability is absent from juvenile death sentences because juvenile defendants, again like the mentally retarded, are also less capable of assisting in the

conduct of an adequate defense. In Atkins, the Court noted that the reduced capacity of mentally retarded offenders created the "risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Atkins, ___ U.S. at ___, 122 S. Ct. at 2251 (quoting Lockett, 438 U.S. at 606). Constitutional protections serve to ensure that the death penalty is not imposed when a less severe punishment is appropriate, but the cognitive and behavioral impairments that make juveniles less culpable also make them less capable of understanding and invoking these safeguards. For example, research shows juveniles have trouble understanding *Miranda* warnings. Juveniles waive their rights to remain silent and to counsel, and make statements regarding suspected felonies approximately ninety percent of the time as compared to approximately sixty percent of the time for adults suspects. Barbara Kaban and Ann E. Tobey, *When Police Question Children: Are Protections Adequate?*, 1 J. CENTER FOR CHILD. AND CTS. 151 (1999). If juveniles cannot understand and effectively invoke their constitutional rights, then procedural safeguards are absent. The chance of a fair trial is decrease while the chance of a wrongful convictions increases, and therefore the reliability that the Constitution requires of death sentences becomes an impossibility.

In Atkins, the inability of mentally retarded defendants to understand and invoke their constitutional rights was the root of yet another factor that indicated the cruel and unusual nature of death sentences for mentally retarded offenders: the "disturbing number" of exonerated death row inmates including "mentally retarded persons who unwittingly confessed to crimes that they did not commit." Atkins, ___ U.S. at ___, 122 S. Ct. at 2252 n.25. These "disturbing" false confessions also frequently occur with juvenile suspects. For example, sixteen-year-old Johnny Ross confessed to a capital rape charge and was sentenced to death in Louisiana in 1975. DNA

evidence cleared Ross in 1980.[10] In 1986, seventeen-year-old Marcellius Bradford agreed to testify against co-defendants in a murder/rape case in exchange for a twelve year sentence. DNA evidence exonerated all defendants in 2001.[11] Seventeen-year-old Mario Hayes confessed to a murder in 1996 but was acquitted at trial after jail records indicated that he had been incarcerated at the time of the murder.[12] Sixteen-year-old Don Olmetti spent two years in jail after he confessed to shooting and killing a woman but the State of Illinois dropped the murder charge because he had an alibi.[13]

VI. Conclusion

In Atkins, the United States Supreme Court declared that the execution of the mentally retarded violated the Eighth Amendment. The Court determined that an evolving standard of decency demonstrated that the practice was cruel and unusual punishment. The Court also found that the diminished capacities of mentally retarded defendants diminished their culpability and that their execution would not further any penological purpose of capital punishment and could be carried out only at great risk of a wrongful execution. These very same facts permeate any discussion of the juvenile death penalty.

The actions of state legislatures and juries and the opinions of the international community, professional and religious organizations, and the American public illustrate an

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[10]Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 157 (1987).

[11]Maurice Possley & Steve Mills, *DNA Test Rules Out Roscetti Inmates; Lawyer for Men Plans to Ask Court for Their Freedom*, CHI. TRIB., Nov. 14, 2001, at 1.

[12]Steve Mills & Maurice Possley, *"Killer" in Jail When Crime Committed; Teen Accuses Cops of Coercing Him into Admitting Guilt*, CHI. TRIB., Apr. 29, 1998, at 1.

[13]James Hill, *Youth Jailed for 2 Years Goes Home*, CHI. TRIB., May 21, 1999, at 1.

evolving standard of decency and national consensus against the practice. Juvenile offenders are less culpable than adult offenders and, therefore, do not deserve a punishment that is reserved for only the most morally blameworthy murderers. Juveniles possess limited knowledge and experience, act on impulse and disregard long-term consequences in a manner that subjects them to a grave risk of execution when they are innocent or their crimes do not rise to the capital level. These facts compel the determination that the juvenile death penalty is unconstitutional.

WHEREFORE, the Defendant prays that the Court declare the juvenile death penalty unconstitutional because it violates the Eighth Amendment of the United States Constitution and Article 1, Section 9 of the Constitution of Virginia and strike death from the case.

Lee Boyd Malvo
By _____
Co-Counsel
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By: _____
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Hon. Jane Marum Roush
Judge
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this 14th day of March, 2003.

_____
Co-Counsel

and

_____
Co-Counsel

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

COMMONWEALTH OF VIRGINIA	)	
	)	
	)	
v.	)	Criminal No. 102888
	)	Hon. Jane Marum Roush
	)	
LEE BOYD MALVO,	)	
aka John Lee Malvo	)	

MOTION FOR BILL OF PARTICULARS AS TO COUNTS I AND II AND INCORPORATED MEMORANDUM OF LAW[1]

Comes now Defendant, Lee Boyd Malvo, by Counsel, and moves this Court pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article One, Sections 8 and 11 of the Virginia Constitution, and Virginia Code Sections 19.2-230 and 19.2-266.2 to order the Commonwealth to produce a bill of particulars as to Counts I and II of the Indictment returned on January 21, 2003.

In support of this Motion, Defendant asserts the following:

I. Statement of the Case

On January 21, 2003, the Fairfax County Grand Jury returned a three count indictment against Lee Boyd Malvo (hereinafter Malvo or Defendant). See Indictment For Capital Murder and Using a Firearm in the Commission of a Felony, Jan. 21, 2003 [hereinafter Indictment].

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[1] This motion assumes, *without conceding*, that Counts I and II properly charge capital murders upon which the death penalty can legally and constitutionally be sought.

Count I alleges that Malvo "did willfully, deliberately and with premeditation kill and murder Linda Franklin in the commission of an act of terrorism as defined in section 18.2-46.4 of the Code of Virginia." See Indictment; see also VA. CODE ANN. § 18.2-31(13) (outlining capital offense of murder during the commission of terrorism). Count II charges that Malvo "did willfully, deliberately and with premeditation kill and murder Linda Franklin, said killing being the killing of more than one person within a three year period." See Indictment; see also VA. CODE ANN. § 18.2-31(8) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of more than one person within a three-year period"). See generally Burlile v. Commonwealth, 261 Va. 501, 544 S.E.2d 360 (2001) (construing Code section 18.2-31(8)).

II. The Indictment Provides Insufficient Evidence for Defendant to Mount Adequately a Defense

The Defendant's right to know the nature and cause of the accusation is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Virginia Constitution. When the indictment is insufficient to inform fully the accused the nature and cause of the charges against him, the trial court may, in its discretion and when demanded by the accused, compel the attorney for the Commonwealth to file such bill of particulars as will inform the defendant of the charges against him. See Roach v. Commonwealth, 251 Va. 324, 340, 468 S.E.2d 98, 107 (1996), *cert. denied*, 519 U.S. 951 (1996); Riner v. Commonwealth, 145 Va. 901, 907-08, 134 S.E. 542, 543-44 (1926); see also VA. CODE ANN. § 19.2-230 ("A court of record may direct the filing of a bill of particulars at any time before trial."). As noted by the Virginia Supreme Court:

> 'The state has no desire to leave one of its citizens in doubt or uncertainty as to any of the offenses charged against him. Prosecuting attorneys know, or ought to know, in advance, what they can prove, and ordinary justice demands that they should give the accused a fair statement of the offense for which he is to be prosecuted.'

Riner, 145 Va. at 907-08, 134 S.E. at 544 (1926) (quoting Webster's Case, 141 Va. 589, 593, 127 S.E. 377, 378 (1925)). A court, therefore, should order a bill of particulars when the indictment contains insufficient information regarding the charged crime to inform the accused in advance of the offense for which he is to be tried. Swisher v. Commonwealth, 256 Va. 471, 480, 506 S.E.2d 763, 768 (1998), *cert. denied*, 528 U.S. 812 (1999).

In addition, there are significant issues of the proper interpretation of the statutory language of the two subsections ((8) and (13)) of Virginia Code Section 18.2-31. Those, depending on interpretation, and context of the specific allegations intended by these indictment counts, may give rise to a proper motion to dismiss these indictment counts on grounds that they are violative of the United States and Virginia Constitutions. Therefore, Virginia Code Section 19.2-266.2 requires a bill of particulars be produced and states that the Court "shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to §19.2-230."

A. Count I

Count I charges Malvo with capital murder under Code section 18.2-31(13). See Indictment; see also VA. CODE ANN. § 18.2-31(13) (outlining capital offense of murder during the commission of terrorism). As the language of the capital murder statute makes clear, Code section 18.2-31(13) takes its definition of "act of terrorism" from Code section 18.2-46.4. Code section 18.2-46.4 contains two distinct mental states whereby a defendant may be guilty of terrorism. Code section 18.2-46.4 states:

> 'Act of terrorism' means an act of violence . . . committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation.

VA. CODE ANN. § 18.2-46.4. Thus, in order to sustain a capital murder conviction under Code section 18.2-31(13), the Commonwealth must prove either that the defendant evinced the intent

to intimidate the civilian population at large, or that he acted with the intent to influence the conduct of government.[2]

Count I of the Indictment, however, fails to specify which of these two mental states the Commonwealth intends to prove at trial. An indictment should allege the requisite intent. Sims v. Commonwealth, 28 Va. App. 611, 622, 507 S.E.2d 648, 654 (1998); see also Taylor v. Commonwealth, 207 Va. 326, 332, 150 S.E.2d 135, 140 (1966). By failing to specify which of the two possible intents the Commonwealth seeks to prove at trial, Count I does not provide Malvo with sufficient notice of the charge pending against him. By failing to set forth the requisite element of intent it fails to give the "accused notice of the nature and character of the accusations against him in order that he can adequately prepare to defend against his accuser." Sims, 28 Va. App. at 619, 507 S.E.2d at 652. Defendant, therefore, is unable to prepare adequately for the upcoming trial: as it stands, he has no way of knowing which of the two possible mental states the Commonwealth seeks to prove in making out its Code section 18.2-31(13) charge.

B. Count II

Count II does not contain sufficient information regarding the charged crime to inform the accused in advance of the offense for which he is to be tried. Although Count II specifically alleges that Malvo murdered Linda Franklin ("Franklin"), it contains no information regarding the alleged "one or more other person" or persons that Malvo allegedly killed. Thus, although Count II clearly specifies that Franklin is the victim of the principal murder for the Code Section

[2] To be clear: Defendant in no way waives his right to challenge at a later date on any available grounds the constitutionality or applicability of Code section 18.2-31(13).

18.2-31(8) charge, it does not specify with any particularity the victim(s) of the gradation murder(s). See Burlilie, 261 Va. at 507, 544 S.E.2d at 363 (discussing difference between principal. See Burlile, 261 Va. at 507, 544 S.E.2d at 363 (discussing difference between principal and gradation murders). Moreover, although Count II specifically alleges that Malvo killed Franklin in Fairfax County, it alleges no venue in which the gradation killing or killings took place.[3]

In Burlile, the grand jury alleged that the defendant "in the City of Richmond . . . did feloniously . . . and with premeditation kill and murder one Chakeisha Carter and within a three (3) year period, did kill and murder another, namely: Richard Harris Jr." Burlile, 261 Va. at 504, 544 S.E.2d at 361. Thus, the grand jury in Burlile alleged with specificity both the victim in the gradation murder and the venue in which the gradation murder occurred. In contrast, Count II alleges neither of these critical facts, leaving Malvo to guess both the victim and the venue of the gradation crime.[4]

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[3] In Thomas v. Commonwealth, 263 Va. 216, 559 S.E.2d 652 (2002), the Supreme Court of Virginia, in upholding a circuit court's decision to refuse to compel a bill of particulars, noted that the indictment at issue in that case "describe[d] the offense charged and *where it occurred.*" Thomas, 263 Va. at 225, 559 S.E.2d at 656 (emphasis added). In contrast, Count II does not allege where the gradation crime occurred. By failing to allege the venue wherein the gradation crime occurred, Count II does not contain sufficient information regarding the charged crime to inform the accused in advance of the offense for which he is to be tried. See Swisher, 256 Va. at 480, 506 S.E.2d at 768.

[4] Defendant does not set forth the Burlile indictment as a model of the perfect manner in which to charge capital murder under Code section 18.2-31(8), nor does Defendant concede that the Burlile indictment adequately and constitutionally charged capital murder under Code section 18.2-31(8). Defendant brings this Court's attention to the Burlile indictments merely to illustrate the paucity of the information contained in Count II as to the section 18.2-31(8) charge.

According to the media, Malvo is a suspect in numerous killings in Virginia, Maryland, Georgia, Louisiana, and the District of Columbia. See, e.g., Paul Bradley, Malvo Indicted in Sniper Slayings, RICH TIMES-DISPATCH, Jan. 22, 2003 at B1 (stating that Malvo is suspected "in a shooting rampage that terrorized the Interstate 95 corridor between Washington and Richmond"); Paul Bradley, Sniper Evidence Laid Out, RICH TIMES-DISPATCH, Jan. 25, 2003 at A1 (stating that law enforcement officials claim to have evidence tying Malvo to multiple shootings in multiple states and jurisdictions). Count II, however, fails to specify which of these alleged killings constitutes the gradation offense for purposes of the Code section 18.2-31(8) charge.[5] Defendant, therefore, is unable to prepare adequately for the upcoming trial: as it stands, he has no way of knowing which of the murders in which he is alleged (at least by the media) to have participated the Commonwealth seeks to prove as the gradation crime in proving its Code section 18.2-31(8) charge.

III. Conclusion

Defendant, therefore, is unable to prepare adequately to defend against Counts I or II. Failure to grant the bill of particulars requested herein will, therefore, violate the notice requirements of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Articles I, Section 8 and 11 of the Virginia Constitution.

For the above reasons, as well as any reasons presented at oral arguments, Defendant respectfully requests that this Court direct the Commonwealth to produce a bill of particulars as to Counts I and II of the Indictment issued by the Fairfax County Grand Jury on January 21,

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[5] To be clear: Defendant does not concede that the Commonwealth may rely on a murder allegedly committed outside of the Commonwealth to support its Code section 18.2-31(8) charge.

2003.

Respectfully submitted,

LEE BOYD MALVO

By_
Co-Counsel

and

By_____
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Judge
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this 14th day of March, 2003.

Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

CRIMINAL CASE NO: 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

MOTION TO EXCLUDE VICTIM IMPACT TESTIMONY
AND INCORPORATED MEMORANDUM OF LAW

COMES NOW the Defendant, Lee Boyd Malvo, by his co-counsels, and respectfully moves this Court to exclude the Commonwealth's irrelevant and highly prejudicial victim impact evidence pursuant to the Fourteenth Amendment to the United States Constitution, because the admission of this evidence would render the Defendant's trial fundamentally unfair.

In support of his motion, the Defendant states as follows:

1. A capital murder defendant is not eligible to be sentenced to death unless the Commonwealth has proven beyond a reasonable doubt that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society ("future dangerousness") or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim ("vileness"), Va. Code Ann § 19.2-264.4.C. These are the only two aggravating circumstances which will support a death sentence in Virginia. Id.

2. Future dangerousness is a "probability that the defendant would commit criminal acts of violence such as would pose a continuing serious threat to society." Smith v. Commonwealth, 219 Va. 455, 477, 248 S.E.2d 135, 148 (1978) (internal quotations omitted). The Virginia Supreme Court has stated that this language is "designed to focus the fact-finder's attention on prior criminal conduct." Id. at 149, 248 S.E.2d at 478. However, in addition to past conduct, the Virginia Supreme Court has also permitted evidence regarding the circumstances of the offense and the heinousness of the crime to prove future dangerousness. Edmonds v. Commonwealth, 229 Va. 303, 312, 329 S.E.2d 807, 813 (1985).

3. Vileness is based upon three sub-elements: torture, depravity of mind and aggravated battery to the victim. §19.2-264.4.C; see ¶ 1, supra. Torture is the least used and consequently the least defined of the vileness sub-elements. See Douglas R. Banghart, Vileness; Issues and analysis, 12 Cap. Def. J. 77, 80 (1999). However, according to Black's Law Dictionary, torture is the infliction of "intense pain to the body or mind for purposes of punishment.... or for sadistic pleasure." Black's Law Dictionary 1490 (6th ed. 1990). Depravity of mind is "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation" Poyner v. Commonwealth, 229 Va. 401, 425, 329 S.E.2d 815, 832 (1985) (citing Smith, 219 Va. at 478, 248 S.E.2d at 149). Depravity of mind may also be established by proof of psychological torture. Id. Aggravated battery has been construed to mean "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." Smith, 219 Va. at 478, 248 S.E.2d at 149. Thus, all three of the vileness sub-elements address *only* the conduct of the

defendant during the commission of the offense and the defendant's mental state at that time.

4. Va. Code Ann. § 19.2-264.4.A1 permits a victim (defined in section 19.2-11.01 as a decedent's spouse, child, parent, sibling or legal guardian) to testify at a capital sentencing hearing. However, such testimony is limited by section 19.2-299.1. Thus, a statutory victim may (i) identify himself or herself, (ii) itemize any economic loss suffered by him or her as a result of the offense, (iii) identify the nature and extent of any physical or psychological injury suffered by him or her as a result of the offense, (iv) detail any change in his or her personal welfare, lifestyle or familial relationships as a result of the offense, (v) identify any request for psychological or medical services initiated by him or her or his or her family as a result of the offense, and (vi) provide such other information as the court may require related to the impact of the offense upon the victim. Va. Code Ann. § 19.2-299.1.

5. None of these categories address the past criminal activity of the defendant, the defendant's conduct during the commission of the offense, the circumstances of the offense or the defendant's mental state at the time of the offense. Therefore, they have absolutely no relevance to the future dangerousness and vileness aggravators as set out by the General Assembly and as construed by the Virginia Supreme Court.

6. Prior to 1998, the Virginia capital sentencing scheme only contemplated the presentation of victim impact testimony to the judge prior to the imposition of sentence. In 1998, section 19.2-264.4.A1, which expressly permits the presentation of this evidence to the jury at the sentencing hearing, was added. In its pre-1998 jurisprudence, the Virginia Supreme Court emphasized that it was permissible to submit

victim impact testimony to a judge because "[a] judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both." Beck v. Commonwealth, 253 Va. 373, 385, 484 S.E.2d 898, 906 (1997) (quoting Eckhart v. Commonwealth, 222 Va. 213, 216, 279 S.E.2d 155, 157 (1981)). Because this type of testimony is as prejudicial today as it was in 1997, and because jurors lack the training, experience and discipline to identify and disregard inadmissible evidence, it is absolutely imperative that trial judges exclude irrelevant and prejudicial evidence before it is presented to the jury.

7. In holding that victim impact testimony is admissible in the capital sentencing context, Virginia courts have consistently relied upon Payne v. Tennessee, 401 U.S. 808 (1991). See Beck, 253, Va. at 381, 484 S.E.2d at 903; see also Weeks v. Commonwealth, 248 Va. 460, 476, 450 S.E.2d 379, 389 (1994). However, Payne did not address the relevance of victim impact testimony to any particular capital sentencing scheme. Payne simply held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se, bar." Payne, 501 U.S. at 827. Significantly, Payne also expressly stated that the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief "in the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." Id. at 825. Furthermore, Justice Souter emphasized the importance of a trial judge's "authority and responsibility to control the proceedings consistently with due process," Id. at 836 (Souter, J., concurring).

8. Thus, it is clear that due process limits the admissibility of victim impact testimony. Furthermore, Justice O'Conner actually conducted due process analysis in her concurring opinion in Payne. Two facts were of central importance to Justice O'Conner's conclusion that the victim impact evidence involved in Payne was admissible. First, the testimony in Payne described the impact of the crime upon a victim *who was personally present at, and immediately affected by, the murder(s)*. Id. at 832 (O'Connor, J., concurring) (stating "3-year old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived – only to witness the brutal murders of his mother and baby sister"). Second, the Payne testimony was merely repetitive and cumulative of evidence that had already been presented to the jury during the guilt/innocence phase of the trial. Id. (O'Connor, J., concurring) (stating "[I]n light of the jury's unavoidable familiarity with the facts of Payne's vicious attach, I cannot conclude that the additional information provided by [the witness's] testimony deprived petitioner of due process").

9. Unlike Payne, most of the statutory victims in this case were not personally present at, or immediately affected, by, the offense. Testimony about the impact of a crime upon a victim who was present at the commission of a crime may be relevant to vileness, because it might involve information about the defendant's conduct and state of mind during the offense; however, a victim who was not present when the crime was committed will not have this type of relevant information. The majority of the Commonwealth's victim impact testimony in the present case is also unlike Payne in that it will not merely be redundant of evidence that has already been presented to the jury. For this reason, the evidence is much more prejudicial than that in Payne.

10. Based upon the foregoing, the Commonwealth's victim impact testimony in the present case is not relevant to either of the aggravating factors at issue in the sentencing hearing. Furthermore, Payne does not – and cannot – make this testimony relevant. While the evidence has no relevant probative value, it prejudicial effect will be extremely high. This testimony will divert the jury's attention from the relevant inquiry with a highly visceral appeal to the jurors' emotions. Therefore, the admission of the Commonwealth's evidence will result in a fundamentally unfair trial.

WHEREFORE the defendant respectfully moves this Honorable Court to exclude the Commonwealth's victim impact evidence.

Respectfully submitted,

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By _____
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and

By _____
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this _____ day of March, 2003.

Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,	)	
	)	
v.	)	**Case No. 102888**
	)	
LEE BOYD MALVO,	)	
Defendant.	)	

SUPPLEMENTAL MOTION TO DEFENDANT MALVO'S MOTION TO PRECLUDE USE OF UNADJUDICATED ACTS

COMES NOW the Defendant, Lee Boyd Malvo, by and through his co-counsel, and states the following as a supplement to his previously filed Motion to Preclude Use of Unadjudicated Acts:

1. **The Ring Trilogy**

Since McMillan v Pennsylvania, 477 U.S. 79 (1986), the United States Supreme Court has decided Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, U.S. 536 U.S. 584 (2002) and has determined that any factor which permits the imposition of the death penalty, when without that factor the maximum would be life, is an element which must be proven to the jury by proof beyond a reasonable doubt. "If a sentencing factor serves to increase a sentence beyond the maximum sentence otherwise statutorily authorized, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an element of the offense." Apprendi, 530 U.S. at 494. Likewise, those facts or factors would be the domain of the jury, and are subject to the standards of proof beyond a reasonable doubt. Harris v United States, 536 U.S. 545, (2002).

2. Why the Virginia Statute §19.2-264.4 Cannot Be Applied Constitutionally Given Ring, et al.

Section §19.2-264.4 (C) of the Code of Virginia state: "The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a *probability* based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, . . . "(italics added). This element, colloquially termed "future dangerousness" must be proven beyond a reasonable doubt, according to the *Ring* trilogy of holdings. The problem is that the statute allows the element to be defined as a "probability", a term which is unworkable under a reasonable doubt standard and therefore unworkable under *McMillan, Apprendi and Ring,* because it is logically antithetical in meaning to the standard of proof itself. "Beyond a reasonable doubt" means something more than, something stronger than simply any "probability". There is, after all, some probability, however slight, that *any* person will commit *any* act. Death sentences cannot be based on so ethereal a concept.

I. The "Probability" Problem

A "probability" is by definition one of two things: either the ratio illustrating the "chance" that an event will occur; or it can be defined as an event that is, in fact, likely to occur. Virginia Code § 19.2-264.4(C) is unclear which definition is intended, which in and of itself is a problem. It is after all, an element of the offense under *Apprendi*, must be proven beyond a reasonable doubt under *Ring*, and yet is somewhat undefined. If the former definition is intended, how large a probability is necessary to be proven? *Any probability?* Is it a one in five chance, one in three,

or is one in a million enough? After all, these are all "probabilities". In fact, it is impossible to refute the fact that a probability exists. The argument can only be one of degree. It cannot be that the legislature intended that if there is *any* chance, however remote, that a defendant would commit another crime, a death sentence is warranted. Logically then, the General Assemble must have applied the latter interpretation.

The latter definition, wherein a "probability" is an event "likely to occur", gets us no further. The question is begged "How likely?". Must it be more likely to occur than not? And regardless, how could this possibly be beyond a reasonable doubt, as required by *Ring*? It cannot be, and by qualifying the element of future dangerousness in this manner, the statute is inapposite to the *Ring* Trilogy which would clearly require that the element itself – that the defendant is *in fact* a continuing threat to society – be proven. The use of a "probability" to prove the element, effectively renders the standard of proof moot, because a probability *always* exists *beyond a reasonable doubt*.

3. <u>Unadjudicated Acts</u>

Likewise, the Commonwealth is permitted to use unadjudicated acts – acts not only unproven, but *unchallenged* – to illustrate future dangerousness, i.e. to establish the *probability* that the defendant will commit another crime. The "reasonable doubt" standard ostensibly applied to the element of future dangerousness is now *completely* lost. The Commonwealth may use allegations which have been subjected to *no* standard of proof to establish a "probability", and the jury may impose death as a result. This is not only in conflict with the holdings of the *Ring* trilogy, but with the United States and Virginia Constitutions as well, for we find that between the lines of a carefully worded statute is a gaping hole, leading to

arbitrary and unreliable sentences, based on undefined and highly subjective concepts.

The admission of unadjudicated acts is conceptually no different than the use of the qualifier of "probability", rendering the Virginia Death Penalty Statute unworkable given recent holdings.

3. **How to Cure?**

The defect in the statute is incurable without amendment. It must be the case that in order to warrant a death sentence, it should be proven beyond a reasonable doubt that a defendant is a future danger to society, and this *cannot* be permitted to be "proven" by probability, as that would be in direct conflict with *Ring*. This is likely why Virginia Code § 19.2-264.2, which is not a "procedural" statute *per se*, but sets the conditions for imposition of the death penalty, is written in more definite terms. Section §19.2-264.2 states that " ... a sentence of death will not be imposed unless the jury shall (1) after consideration of the *past criminal record* of conviction of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed." The statutory language is plain, free from ambiguity, and expresses a definite sensible meaning that is conclusively presumed to be the meaning intended by the legislature. Section §19.2-264.2 meets all of these standards and it is presumed to intend what it says – only past criminal convictions, already proven beyond a reasonable doubt, can be used to show future dangerousness.

The Court can remove the problem from the instant case by precluding the Commonwealth from seeking the death penalty, on the grounds that as written, the statute does

not comport with *Apprendi* and *Ring*. In the alternative, the Court should most certainly strike unadjudicated acts from evidence, as they only exacerbate the uncertainty already inherent in Virginia's death penalty scheme, where "probability" can warrant execution.

Wherefore, in light of the information supplied herein and ***the argument to be made in court***, the Defendant respectfully requests this Honorable Court enter an Order precluding the Commonwealth from seeking the death penalty based on grounds that the statute does not comport with *Apprendi* and *Ring* or, in the alternative, from using prior unadjudicated acts in an effort to prove future dangerousness.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a true copy of the foregoing Supplemental Motion to Defendant Malvo's Motion to Preclude Use of Unajudicated Acts was mailed first class to:

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Hon. Jane M. Roush
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this 14th day of March, 2003.

Co-counsel

Co-counsel

VIRGINIA:

IN THE FAIRFAX COUNTY CIRCUIT COURT

COMMONWEALTH OF VIRGINIA,	)	
v.	)	Criminal No. 102888
LEE BOYD MALVO,	)	
Defendant.	)	

MOTION FOR APPOINTMENT AND FUNDING OF EXPERTS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW Defendant, Lee Boyd Malvo, by counsel, and moves this court to appoint and fund expert witnesses to assist defense counsel in the preparation of his case, and in support thereof states as follows:

I. Ake, Caldwell and Husske

Almost twenty years ago, the United States Supreme Court, in recognizing the imbalance between the resources available to a State versus an indigent defendant, addressed that imbalance and found that the Constitution requires appointment and payment of a competent, independent psychiatrist to assist the defense. See Ake v. Oklahoma, 470 U.S. 68 (1985). Shortly thereafter, that Constitutional requirement was extended, by implication, to non-psychiatric experts. Caldwell v. Mississippi, 472 U.S. 320 (1985)(The Court found against the defendant's argument for failure to grant experts, but only on the grounds that adequate information was not provided by the defense at the trial stage).

Based on these decisions, most federal and state courts have concluded that the principles announced in Ake extend well beyond mental health experts and have consistently held that the Constitution requires the appointment of a wide variety of non-psychiatric experts in federal courts. See, e.g., Little v. Armontrout, 835 F2d 1240, 1243-44 (8th Cir. 1987), *cert denied*, 487 U.S. 1210 (1988); Moore v. Kemp, 809 F.2d 702, 709-12 (11th Cir.), *cert. denied*, 481 U.S. 1054 (1987); Thornton v. State, 339 S.E.2d 240, 241 (Ga. 1986); Harrison v. State, 644 N.E.2d 1243, 1252-53 (Ind. 1995); Kennedy v. State, 578 N.E.2d 633, 639-40 (Ind. 1991), *cert. denied*, 503 U.S. 921 (1992); State v. Coker, 412 N.W.2d 589, 592-93 (Iowa 1987); Polk v. State, 612 So.2d 381, 393-94 (Miss. 1992); State v. Moseley, 449 S.E.2d 412, 424-25 (N.C. 1994), *cert. denied* ___ U.S. ___, 115 S.Ct. 1815 (1995); State v. Mills, 420 S.E.2d 114, 117-19 (N.C. 1992); Rogers v. State, 890 P.2d 959, 966-67 (Okla. Crim. App. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 312 (1995); State v. Edwards, 868 S.W.2d 682, 697-98 (Tenn. Crim. App. 1993); Rey v. State, 897 S.W.2d 333, 337-38 (Tex. Crim. App. 1995).

Indeed, the United States Congress has codified the right to expert assistance in 18 U.S.C. §3006A(c)(1) which states that indigent defendants are entitled by law to money for investigative and expert services that are "necessary for adequate representation."

Additionally, a number of state courts have joined the Federal courts and taken a further step, declaring that Ake also applies outside the capital murder arena. See, e.g., Little v. Armontrout, 835 F2d 1240, 1243-44 (8th Cir. 1987), *cert denied*, 487 U.S. 1210 (1988); State v. Barnett, 909 S.W.2d 423, 427-28 (Tenn. 1995).

The Virginia Supreme Court has followed this precedent and in Husske v. Commonwealth, 252 Va. 203, 476 S.E.2d 920 (1996) the Court established that the rationale of the United States Supreme Court's decision in Ake applies to all experts reasonably necessary for

an effective defense in Virginia. Husske established that Ake requires appointment of experts conversant in fields other than mental health, and that the Ake right extends to noncapital defendants. Importantly, the Court wrote "[w]e are of the opinion that Ake and Caldwell, when read together, require that the Commonwealth of Virginia, upon request, provide indigent defendants with 'the basic tools of an adequate defense,' Ake, 470 U.S. at 77, and, that in certain instances, these basic tools may include the appointment of non-psychiatric experts." Husske, 252 Va. at 211. The Court further noted that to qualify for the appointment of experts as described, a defendant may meet his burden by "demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." Husske, 252 Va. at 212.

Following Husske, in Hodges v. Commonwealth, 26 Va.App. 43, 492 S.E.2d 846 (1997), the trial court awarded, at the expense of the Commonwealth, two DNA experts in a non-capital case, and the Court of Appeals affirmed the trial court's decision not to fund a *third* DNA expert.

II. The Heightened Need For Experts In Capital Cases

It must also be considered that the defendant cannot be expected to rely on the opinion of the Commonwealth's experts when his life is at stake. Even the most basic examination of physical evidence generally performed by Commonwealth crime laboratories is consistently subject to differing, or mistaken opinions and analysis. See e.g., Decker, Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents, 51 Cinn. L. Rev. 574, 577 (1982) (citing study by Law Enforcement Assistance Administration); Jonakait, Will Blood Tell: Genetic Markers in Criminal Cases, 31 Emory L.J. 833 (Fall 1982). Moreover, in an adversary system, it is rarely justifiable for one side to have exclusive access to the means of understanding, presenting and explaining relevant facts.

III. The Effects Of Daubert On The Need For Experts

Furthermore, the import of the adversarial aspects of our legal system, particularly regarding expert testimony, has recently been drastically augmented. First, in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the standard of admissibility of expert testimony has moved away from the subjective "general acceptance rule" set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), toward a more objective standard based on verified scientific method. It was therein opined that the district court in its "gate keeping" role must determine, first "whether the reasoning or methodology underlying the testimony is scientifically valid," and second, "whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 592. These two requirements for expert testimony have been termed "reliability" and "fit." The "fit" element requires an analysis not of whether the area of expertise is valid, but of whether the facts and data presented match the accepted reasoning and/or methodology, and whether the conclusions drawn are appropriate.

In establishing its new approach to the admission of expert testimony, the Daubert Court assumed that the lawyer opposed to the admission of expert evidence (as to "reliability" or "fit") would present the trial court with the case against admission. This lawyer would present (most likely through the client's own expert, or through a cross-examination prepared with expert consultation) the reasons why the trial court should deem the opponent's expert inadmissible under Daubert. Daubert, 509 U.S. at 595-96. Similarly, on those occasions when the trial judge admits shaky or erroneous science as evidence, the jury system serves as the final check: "[v]igorous cross-examination [and the] presentation of contrary evidence" will enable the jury to make up for the judge's admission and reject the erroneous science. Id. Thus the Court

recognized that experts are required not just to serve as a "trial sword" to present an affirmative defense like insanity, but also, and crucially as a "trial shield" to rebut the State's case.

This "trial shield" aspect of the use of experts within the adversary system can be related, full circle, back to the Ake decision. The Ake Court noted that the trial court's decision to deny Ake's request for an expert denied him the "means of presenting evidence to rebut the State's evidence of his future dangerousness." Ake, 470 U.S. at 83. Thus, the specific holding in Ake acknowledges that denying an indigent defendant of "trial shield" experts can cause a Constitutional violation.

IV. The Experts Needed In This Case

The following is a list of experts that are now sought. In addition to the explanation for justification given above, each of the following proposed experts includes a brief description of a particularized need already identifiable. (Counsel for Mr. Malvo will submit, under seal, the names, anticipated time commitment, and fee schedule of each of the proposed experts, and if requested, the resume of each.)

1. Funding for a DNA expert and independent testing: in preparation of these motions, counsel has discussed DNA issues with the founders of the Innocence Project, an organization devoted to testing and evaluating DNA evidence and the inaccuracies associated with laboratory data and "expert" conclusions based thereon. By way of example, it was recently disclosed that an audit of a laboratory in Houston, Texas, revealed that technicians had misinterpreted data, were not appropriately trained and had not followed appropriate procedures. Similar questions have been raised about laboratories in Oklahoma City, Montana, Washington State and elsewhere. There have also been issues that have arisen in the past concerning FBI labs. The Commonwealth has already presented, prior to the preliminary hearing, conclusions derived from genetic testing

data. It is anticipated that testimony will be offered at trial relating to those documents. The results include conclusions concerning major and minor contributors to DNA samples, the most subjective conclusions drawn in a DNA report.

An appropriate defense requires the Commonwealth's Attorney to provide all the underlying data, including bench notes, from the time the evidence was identified through the testing process, the original "swabbing" surfaces and associated samples for independent testing, the funding of an expert to interpret the information and it requires the Commonwealth to provide the funding for independent testing of the original samples.

2. A Mitigation Specialist To Assist With Any Conditionally Required Sentencing Phase: the information provided by the Commonwealth thus far has indicated a plan to introduce unprecedented levels of information and accusations of unadjudicated acts. A Constitutionally adequate defense requires the appointment of a mitigation specialist with sufficient practical experience and background knowledge to appropriately undertake and handle this important phase of the case. In any capital case the defense must begin to prepare for a possible penalty phase from the very start. The need is even greater in the present case where mitigation witnesses and evidence are spread across the United States and in two foreign countries, Jamaica and Antigua. Any doubt regarding the need of a thorough mitigation presentation was removed by the United States Supreme Court in Williams v. Taylor, 529 U.S. 362 (2000), where the Court held that insufficient mitigation investigation and preparation amounted to ineffective assistance of counsel.

Such an appointment is statutorily authorized, since such an expert is generally a licensed social worker and thus closely akin to a mental health expert. Section 19.2-264.3:1 of the Virginia Code specifies that "the court shall appoint one or more qualified mental health experts

to evaluate the defendant and assist the defense . . . "(emphasis added). Additionally, the American Bar Association notes that "[a] mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings." *See* American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 4.1, p. 33 (Revised Edition; February 2003).

3. A Handwriting Expert: the Commonwealth presented to defense a "report" by a handwriting expert which reaches certain conclusions about common authorship based on an analysis of certain "notes" found at alleged crime scenes. It is anticipated that testimony in support of the report will be offered. An inspection of the handwritten notes indicates that there are discrepancies in the way certain similar letters are written, and different spellings of the same word, which immediately could call for a different conclusion than the one reached. Obviously, defense counsel cannot offer such an opinion, but must rely on an expert to analyze the handwriting.

Even if the prosecution does not offer evidence of the authorship of the alleged notes, an independent defense expert's analysis of the handwriting on those notes will be relevant and material to the defense. First, in order to prepare for the possibility that the prosecution may offer the notes as rebuttal evidence ("trial shield"). Second, for the exculpatory evidence that may be revealed by analysis ("trial sword").

Additionally, with regard to the Daubert analysis above, one Federal Fourth Circuit court recently decided that a handwriting expert's testimony met virtually none of Daubert's reliability standards, and limited the testimony to a description of points of similarity of samples, without any conclusions as to common authorship. United States v. Hines, 55 F.Supp.2d 62 (D.Md. 1999).

4. A Voice/Audio Expert: at the preliminary hearing, the Commonwealth relied on voice identification to assert that a tape recording was Mr. Malvo's voice. The Commonwealth relied on testimony from Detective June Boyle, who insisted on an absolute positive identification of his voice based on her one interrogation of him. When asked to clarify, Detective Boyle stated that Mr. Malvo has a voice that is "very smooth, well-spoken, kind of on the high-pitched side." However, the highly indiscernible recording she identified was low-pitched, stressed and not smooth. Again, defense counsel opinion concerning these issues can not be offered, and an expert is required and necessary.

5. A Ballistics Expert: the Commonwealth has relied on thus far, and it is anticipated will continue to rely to an even greater extent, on reports and conclusions of ballistics analysis to show commonality among a number of incidents that relate to the guilt and potential sentencing phases of the case. The ballistics analysis is seemingly the prosecution's most important forensic evidence, and is highly material to the trial of this matter. An adequate defense must include the appointment of a ballistics expert, the absence of which would result in a fundamentally unfair trial.

6. A Fingerprint Expert: it is anticipated that the Commonwealth shall rely on reports and conclusions of a fingerprint expert that one of Mr. Malvo's fingerprints appears on the alleged weapon. Similar to the information of the ballistics expert, the fingerprint analysis will represent an important and material aspect of the Commonwealth's case. Again, an adequate defense must include the appointment of a fingerprint expert to establish a fundamentally fair trial.

WHEREFORE, the Defendant respectfully requests the appointment and funding of the following experts: 1) Funding for a DNA expert and independent lab testing; 2) A Mitigation Specialist To Assist With Any Conditionally Required Sentencing Phase; 3) A Handwriting

Expert; 4) A Voice/Audio Expert; 5) A Ballistics Expert; and 6) A Fingerprint Expert.

Respectfully submitted,
LEE BOYD MALVO

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Hon. Jane Marum Roush
Judge
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this 14th day of March, 2003.

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Co-Counsel

and

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Co-Counsel